(10)

CFS

13.50

No. 83-703-CFX
Status: GRANTED

Title: Florida Power & Light Company, Petitioner
v.
Joette Lorion, etc., et al.

Docketed:
October 28, 1983

Court: United States Court of Appeals for the District of Columbia Circuit

Side:
83-1031

Counsel for petitioner: Reis, Harold F., Solicitor General

Counsel for respondent: Hodder, Martin H., Solicitor General, Knotts Jr., Joseph B.

ntry	Date	Note	Proceedings and Orders
1	Oct 28 1983	G	Petition for writ of certiorari filed.
3	Nov 21 1983		Order extending time to file response to petition until December 22, 1983.
4	Dec 5 1983		Order further extending time to file response to petition until January 2, 1984.
6	Dec 28 1983		Order extending time to file response to petition until February 2, 1984.
8	Feb 22 1984		DISTRIBUTED. March 16, 1984
10	Feb 21 1984	X	Brief of respondent Joette Lorion in opposition filed. VIDED.
12	Mar 19 1984		REDISTRIBUTED. March 23, 1984
14	Mar 26 1984		Petition GRANTED. The case is consolidated with 83-1031, and a total of one hour is allotted for oral argument.
			**********
15	May 11 1984		Joint appendix filed. VIDED.
16	Jun 8 1984		Brief of petitioner FL Power & Light Co. filed. VIDED.
17	Jun 8 1984		Brief amicus curiae of Atomic Industrial Forum, Inc. filed. VIDED.
18	Jun 9 1984		Brief of petitioners U. S. NRC, et al. filed. VIDED.
19	Jun 18 1984		Record filed.
20	Jun 22 1984	G	Motion of petitioner in No. 83-703 for divided argument filed.
21	Jun 26 1984	G	Motion of the Solicitor General for civiced argument filed.
22	Jul 2 1984		Motion of petitioner in No. 83-703 for divided argument GRANTED. and a total of fifteen minutes is allotted for that purpose.
23	Jul 2 1984		Motion of the Solicitor General for civiced argument GRANTED. and a total of fifteen minutes is allotted for that purpose.
25	Jul 9 1984		Order extending time to file brief of respondent on the merits until August 8, 1984.
26	Aug 8 1984		Brief of respondents Joette Lorion, et al. filed. VIDED.
27	Aug 21 1984		CIRCULATED.
28	Aug 28 1984		SET FOR ARGUMENT. Monday, October 29, 1984. This case is consolidated with No. 83-1031. (1st case) (1 hour)
29	Sep 15 1984	G	Motion of the Solicitor General to permit Charles A. Rothfeld, Esquire, to present oral argument pro hac vice filed.
30	Oct 9 1984		Motion of the Solicitor General to permit Charles A. Rothfeld, Esquire, to present oral argument pro hac vice

o. 83-703-CFX

ntry	Date	Note	Proceedings and Orders
			GRANTED.
31	Oct 5 1984	X	Reply brief of petitioner FL Power & Light Co. filed. VIDED.
32	Oct 22 1984	X	Reply brief of petitioners U.S. NRC, et al. filed. VIDED.
33	Oct 29 1984		ARGUED.

83-703

No. 83-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

FLORIDA POWER & LIGHT COMPANY,
Petitioner,

v.

JOETTE LORION, d/b/a
CENTER FOR NUCLEAR RESPONSIBILITY,
Respondent,

UNITED STATES NUCLEAR REGULATORY COMMISSION
and the UNITED STATES OF AMERICA,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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October 28, 1983

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Provisions of the Atomic Energy Act (Section 189; 42 U.S.C. § 2239) and the Administrative Orders Review Act (28 U.S.C. § 2342) confer exclusive jurisdiction on the courts of appeals to review final Nuclear Regulatory Commission orders in any proceeding "for the granting, suspending, revoking, or amending of any license. . . ." The question presented is whether those statutes confer subject matter jurisdiction upon the courts of appeals to review orders of the Commission refusing a request to institute such a proceeding.

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IN THE

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OCTOBER TERM, 1983

No. 83-

FLORIDA POWER & LIGHT COMPANY,
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JOETTE LORION, d/b/a
CENTER FOR NUCLEAR RESPONSIBILITY,
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UNITED STATES NUCLEAR REGULATORY COMMISSION
and the UNITED STATES OF AMERICA,
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OPINIONS BELOW

The opinion of the Court of Appeals is reported at 712 F.2d 1472 (D.C. Cir. 1983), and is reproduced in the Appendix. That opinion was issued on review of a decision of the Director of the Office of Nuclear Reactor Regulation of the United States Nuclear Regulatory Commission. *Florida Power & Light Company* (Turkey Point Plant, Unit 4), DD-81-21, 14 NRC 1078 (1981). The Director's decision is also reproduced in the Appendix.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit is dated July 26, 1983. Issuance of the mandate was withheld until seven days after disposition of any timely petition for rehearing. The Government Respondents filed a timely petition for rehearing and suggestion for rehearing *en banc*, which were denied on September 22, 1983. However, issuance of the mandate was stayed pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure until October 31, 1983, pending application for a writ of certiorari. This Court has jurisdiction to review the judgment below by writ of certiorari pursuant to 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

This case involves consideration of Section 189 of the Atomic Energy Act of 1954, as amended (42 U.S.C. § 2239), 28 U.S.C. § 2342 and 10 CFR §§ 2.202 and 2.206. These provisions are reproduced in the Appendix. App. 26-31.

STATEMENT OF THE CASE

1. The NRC Proceeding

This case arose as a result of a letter from Joette Lorion, written to the NRC on September 11, 1981, requesting that Turkey Point Unit No. 4, owned and operated by Florida Power & Light Company, an NRC licensee, be shut down immediately for a steam generator inspection and that consideration be given to suspension of the operating license for the unit because of concerns over the safety of its pressure vessel. App. 16-17. The letter was referred to the Director of the NRC's Office of Nuclear Reactor Regulation for consideration in accordance with 10 CFR § 2.206 (*Id.*), which provides a procedure for NRC consideration of requests "to institute a proceeding pursuant to § 2.202 to modify, suspend or

revoke a license, or for such action as may be proper." App. 30.[1]

The Director responded by issuing a written decision discussing each of Ms. Lorion's claims in detail, concluding that none of the action she requested was warranted and denying her requests. App. 16-25. The Commission declined to review the Director's action, which consequently became the final action of the agency.

2. Court of Appeals Proceedings

Ms. Lorion petitioned for review pursuant to Section 189b. of the Atomic Energy Act, as amended (42 U.S.C. § 2239(b)) and the Administrative Orders Review Act (28 U.S.C. § 2342(4)),[2] which, together, grant exclusive jurisdiction to the courts of appeals to review final orders of the NRC entered in any proceeding referred to in Section 189a. of the Atomic Energy Act (42 U.S.C. § 2239(a)). Included in Section 189a. is any proceeding "for the granting, suspending, revoking, or amending of any license. . . ." Florida Power & Light Company intervened.

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[1] 10 CFR § 2.202 authorizes designated NRC officials, including the Director, to institute show cause proceedings "to modify, suspend, or revoke a license." 10 CFR § 2.206 provides that any person may request that such procedings be instituted. The Commission has followed the practice of treating requests that it take such action, whether or not a request expressly refers to 10 CFR § 2.206 or is formally designated a petition, as falling within that provision; and the court below expressly approved such treatment of Ms. Lorion's letter. App. 4.

[2] App. 2. The Administrative Orders Review Act (Act of December 29, 1950, as amended, 28 U.S.C. §§ 2341-2352) grants exclusive jurisdiction to courts of appeals to review "all final orders of the [NRC] made reviewable by section 2239 of title 42 [Atomic Energy Act, § 189]." 28 U.S.C. § 2342(4). Subsection b. of Section 189 provides for judicial review pursuant to the Administrative Orders Review Act of "[a]ny final order entered in any proceeding of the kind specified in subsection a. . . ." Subsection a. proceedings include "any proceeding . . . for the granting, suspending, revoking, or amending of any license or construction permit. . . ." 42 U.S.C. § 2239.

The briefs of the parties addressed several issues concerning the propriety of the Commission action, including the Commission's decision to treat Ms. Lorion's letter as a request under 10 CFR § 2.206, and the lawfulness of the Director's disposition of Ms. Lorion's requests. However, the question whether the court had jurisdiction to review the Director's refusal to institute such proceedings was not referred to in any of the briefs. This was obviously because, beginning with the District of Columbia Circuit, every court of appeals which had been presented with the question had either expressly decided that it possessed such jurisdiction or proceeded on that assumption. *Infra*, pp. 5-6.

The issue of jurisdiction was raised for the first time in this case by the panel on oral argument. Government counsel offered to submit a memorandum on the subject. However, the court rejected the offer, and, without receiving any brief or memorandum on the issue from any party, concluded in the decision below that it lacked subject matter jurisdiction over the proceeding. In consequence it transferred the case to the United States District Court for the District of Columbia pursuant to 28 U.S.C. § 1631. App. 15.

Essentially the decision below holds that a request under 10 CFR § 2.206 "triggers a preliminary investigation by the NRC's staff to determine whether a formal proceeding[3] should be instituted . . ." pursuant to Section 189a.; however, the court held, "the Commission's processing of such requests . . ." is not itself such a proceeding under Section 189a. App. 6-7. And, because

[3] Section 189a. provides that "the Commission shall grant a hearing upon the request of any person whose interest may be affected" by any proceeding there referred to, including any proceeding "for the granting, suspending or amending of any license. . . ." The court below apparently used the term "formal proceeding" to mean one in which a full adjudicatory hearing is made available to interested persons. App. 5-6, 12-13.

Section 189b. only confers review jurisdiction upon courts of appeals over proceedings referred to in Section 189a., the court below concluded it lacked subject matter jurisdiction over the petitions to review. App. 11-12.

REASONS FOR GRANTING THE WRIT

I. The Decision Below Creates a Conflict Among the Circuits Regarding the Jurisdiction of Courts of Appeals to Review NRC Denials of Requests Under 10 CFR § 2.206.

As the court below recognized in its discussion of the precedent interpreting Section 189b., its own considered holding in *Natural Resources Defense Council, Inc v. Nuclear Regulatory Commission*, 606 F.2d 1261 (D.C. Cir. 1979), has been uniformly followed by other courts of appeals which have reviewed denials of 2.206 enforcement requests. In *NRDC*, the Court of Appeals for the District of Columbia Circuit agreed with the NRC's argument that Commission denials of requests that it assert its licensing authority were properly reviewable only in the courts of appeals. According to the court, the NRC's order refusing, on jurisdictional grounds, to license certain tanks constructed for the storage of high-level radioactive waste was within the class of final orders exclusively reviewable by the courts of appeals pursuant to Section 189b. and 28 U.S.C. § 2342. The NRDC's argument to the contrary relied on the fact that the NRC's decision preceded, and rendered unnecessary, any licensing action. The court responded that

> In the circumstances of this case, the absence of an application for a license is not dispositive. Since a licensing jurisdiction determination is a necessary first step in any proceeding for the granting of a license, we hold that NRC's decision was 'entered in a proceeding' for 'the granting . . . of any license.'[4]

[4] 606 F.2d at 1265.

The *NRDC* decision was relied on by the Seventh Circuit in *Rockford League of Women Voters v. Nuclear Regulatory Commission*, 679 F.2d 1218 (7th Cir. 1982), upholding the NRC's denial of a Section 2.206 request to institute construction permit revocation proceedings on the basis of allegedly unresolved safety concerns. The opinion indicated that, while Section 189 could reasonably be interpreted either way, the interests of conformity and judicial economy favored review by the appellate courts.

The D.C. Circuit thereafter followed its earlier *NRDC* holding in *Seacoast Anti-Pollution League of New Hampshire v. Nuclear Regulatory Commission*, 690 F.2d 1025 (D.C. Cir. 1982). In *Seacoast*, the court below held that a

> Commission's determination whether to institute a revocation proceeding was 'a necessary first step' in any proceeding for the revocation of the Seabrook construction permits. Hence, we hold that the Commission's final order refusing [a Section 2.206 request] to institute such a proceeding is reviewable by this court under 42 U.S.C. § 2239 (1976).

690 F.2d at 1028. Similar holdings by other Circuit Courts of Appeals have completed the uniform body of case law prior to the decision below.[5]

In this case, however, the Court of Appeals abandoned its previous holdings as well as the precedent in other

[5] *See* County of Rockland v. NRC, 709 F.2d 766 (2nd Cir. 1983), pet. for cert. pending (No. 83-329) (NRC denial of 2.206 request reviewable in courts of appeals); Simmons v. Arkansas Power & Light Co., 655 F.2d 131 (8th Cir. 1981); Sunflower Coalition v. NRC, 534 F. Supp. 466 (D. Colo. 1982); Desroisiers v. NRC, 487 F. Supp. 71 (E.D. Tenn. 1980); Susquehanna Valley Alliance v. Three Mile Island, 485 F. Supp. 81 (M.D. Pa. 1979), aff'd/rev'd in part, 619 F.2d 231 (3rd Cir. 1980), cert. denied sub nom. General Public Utilities Corp. v. Susquehanna Valley Alliance, 449 U.S. 1096 (1981); Honicker v. Hendrie, 465 F. Supp. 414 (M.D. Tenn. 1979), appeal dismissed, 605 F.2d 556 (6th Cir. 1979), cert. denied, 444 U.S. 1072 (1980); Paskavitch v. NRC, 458 F. Supp. 216 (D. Conn. 1978).

circuits. Pointing to decisions holding that the Commission need not hold hearings on Section 2.206 requests (App. 7), it stated that it is "no longer comfortable with the strain our decisions have placed on the clear-cut language of 42 U.S.C. § 2239." App. 10. Continued the court,

> we can no longer reconcile the 'necessary first step' rationale of *Natural Resources Defense Council, Inc. v. Nuclear Regulatory Commission*, 606 F.2d 1261 (D.C. Cir. 1979) and *Seacoast Anti-Pollution League of New Hampshire v. Nuclear Regulatory Commission*, 690 F.2d 1025 (D.C. Cir. 1982) with . . . the Commission's steadfast insistence that the section 2.206 process does not entail a 'proceeding' within the meaning of 42 U.S.C. § 2239(a).[6] Accordingly, we hold that this court is without subject matter jurisdiction to review directly the Commission's section 2.206 decisions under 42 U.S.C. § 2239(b).

App 13-14.

In so holding, the court below created a square conflict among the circuits. While in the Second, the Seventh, and the Eighth Circuits, appeals of NRC denials of Section 2.206 requests for enforcement action against nuclear licensees are now to be heard, on the agency record, by the courts of appeals, the D.C. Circuit Court will not entertain such petitions. The mere existence of that conflict represents a significant enough potential for confusion and unnecessary litigation to justify grant of this petition.[7] We believe it appropriate, how-

[6] In its brief to the court below, the Government argued that Ms. Lorion was not entitled to an evidentiary hearing on her 2.206 request, because such a request is not a Section 189a. proceeding. App. 7; *see also*, App. 13.

[7] Supreme Court Rule 17.1(a); *see, e.g.*, Avco Corp. v. Aero Lodge No. 735, 390 U.S. 557, 559 (1968); Northeastern Pennsylvania National Bank & Trust Co. v. United States, 387 U.S. 213, 217 (1967).

ever, to point out some of the circumstances in which a substantial impairment of the functioning of the federal judiciary, and therefore of the administrative system which is subject to judicial review, is particularly likely as long as the present confusion continues regarding the procedures for obtaining judicial review of 2.206 denials. We do so below.

II. The Decision Below Presents an Important Question of Federal Law.

By deviating from the hitherto uniform view of the circuits that considered the jurisdictional issue presented, the court below injected uncertainty and confusion into an appellate review process which had previously been clear and uniform. If the decision stands, it will encourage forum shopping among circuits by petitioners desiring either court of appeals or district court review. A resident of the Seventh Circuit, for example, would have the option of appealing an NRC denial of a 2.206 request to the Court of Appeals for that Circuit or in the District of Columbia.[8] In the latter case, the decision below would mandate review by one of several possibly appropriate district courts.[9] The incentives to engage

[8] 28 U.S.C. § 2343 provides that "[t]he venue of a proceeding under this chapter is in the judicial circuit in which the petitioner resides or has its principal office, or in the United States Court of Appeals for the District of Columbia Circuit."

[9] 28 U.S.C. § 1391(e) provides:

> A civil action in which a defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority, or an agency of the United States, or the United States, may, except as otherwise provided by law, be brought in any judicial district in which: (1) a defendant in the action resides, or (2) the cause of action arose, or (3) any real property involved in the action is situated, or (4) the plaintiff resides if no real property is involved in the action.

In any partciular action, therefore, three different district courts might conceivably each have venue.

in forum shopping would be magnified to the extent that petitioners perceive a variance in district court and court of appeals review practices and among district courts, and a consequent benefit in choosing one court over the other.

Moreover, if the decision below stands, it will result in excessive layers of review in the District of Columbia Circuit. This was a consideration which influenced that court when it first decided the question in the *NRDC* case, 606 F.2d at 1265, and one that led the Seventh Circuit, in *Rockford*, to concur in the conclusion that the courts of appeals have jurisdiction to review denials of Section 2.206 requests. There the court stated:

> Whenever the district courts have jurisdiction to review agency action, it means that anybody aggrieved by that action is entitled to two successive judicial reviews of it—first in the district court and then, on appeal, in the court of appeals. This in turn implies five tiers of potential judicial or quasi-judicial review of the petitioner's request in this case: by the Director of Nuclear Reactor Regulation, by the full Commission, by the district court, by the court of appeals, and by the Supreme Court. This is too much.

679 F.2d at 1221.

In addition, the decision below results in the anomaly of judicial review of final agency action turning on whether the agency's decision upon an enforcement request is positive or negative.[10] It thereby undesirably "splinters judicial review of claims that arise essentially out of the same factual setting." *General Public Utilities Corporation v. Susquehanna Valley Alliance*, 449

[10] In the event an NRC Director should grant an enforcement request and institute a show cause proceeding for the granting, revoking or suspending of a license, the final decision following any hearing would, even under the rationale of the decision below, be reviewable in the courts of appeals.

U.S. 1096, 1099 (1981) (Rehnquist, J., dissenting). And, certainly, there is likely to be considerable confusion and burdensome litigation in circuits which have not addressed the jurisdictional question unless this Court resolves the conflict.

These adverse effects on the rational administration of the appellate review process are compounded by the frequency with which opportunities to seek judicial review of 2.206 denials arise. A review of the published NRC decisions discloses that in 1982 alone [11] the Director denied over a dozen requests to initiate enforcement action against nuclear licensees. Past denials have culminated in a number of appeals,[12] a course that the decision below, which effectively multiplies the choices available to an unsatisfied 2.206 petitioner, will probably encourage.

The opinion, moreover, sheds doubt on the proper avenue for challenges to NRC orders declining to institute other types of proceedings specified in Section 189a., including those "for the issuance or modification of rules and regulations dealing with the activities of licensees [or] for the payment of compensation, an award, or royalties. . . ." Since the statutory scheme for judicial review of NRC decisions on these matters parallels that analyzed by the court below, petitioners denied requests to institute rulemakings are likely to be faced with the same confusing array of appellate forums as is now the case with rejected 2.206 petitioners. Litigants will be unsure where to file challenges to any of these NRC actions. The result will be the expenditure of significant judicial, agency, and private resources to resolve jurisdictional questions that can be answered by this Court.

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[11] The 1982 Directors Decisions are reported in Volumes 15 and 16 of the Nuclear Regulatory Commission published reports.

[12] See cases cited supra at pp. 5-6.

III. The Court Below Erred in Dismissing the Appeal for Lack of Subject Matter Jurisdiction.

The decision below presents a situation in which the District of Columbia Circuit first, in *NRDC*, expressly and deliberately decided that the courts of appeals have exclusive jurisdiction to review denials of Section 2.206 enforcement requests; thereafter, every circuit which addressed the question either adopted that view or simply applied it without question. Basic jurisprudential principles would appear to dictate that, in such circumstances, the accepted interpretation should not be repudiated for other than the most compelling reasons. We submit that no such compulsion exists here.

The court below was clearly struck by the apparent conflict between the NRC's position that the measures taken to process a request for enforcement action under 10 CFR § 2.206 do not constitute a "proceeding" within the meaning of section 189a., so as to require an evidentiary hearing, and its claim that a decision denying the requested enforcement action is part of a "proceeding" within the meaning of Section 189b. for the purposes of conferring review jurisdiction upon the courts of appeal. App. 6-8, 10-14. The court held that the "unusual interlocking scheme" embodied in subsection a. and b. of Section 189 "does not allow 'proceeding' to mean one thing for procedural purposes and another for jurisdictional purposes." App. 11.[13]

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[13] To some extent this conclusion was based on the Government's statement in its initial brief that until a request for an enforcement proceeding is granted, there is no "proceeding." App. 7. However, the Government subsequently pointed out in its request for rehearing—the first opportunity it had to brief the issue—that argument was made in response to contentions that a mere enforcement request triggers a right to an evidentiary hearing under Section 189a. The Government did not mean to suggest that the denial of the request "cannot be a step in a proceeding prior to any hearing or cannot itself be an informal proceeding." Government counsel acknowledged its failure to articulate the dis-

However, this rigid view collides with the more flexible approach commonly applied by interpreters of statutes providing for judicial review, which seeks to reach a result consistent with logic as well as language. As is evident, prior decisions have interpreted "proceeding" in Section 189b. to include informal 2.206 determinations in part in order to avoid the unnecessary extra layer of judicial scrutiny which would follow if district court review were interposed between the administrative order and appeal to the circuit courts. In similar contexts, the same conclusion has been reached. Thus in *Amusement and Music Operators Ass'n. v. Copyright Royalty Tribunal*, 636 F.2d 531 (D.C. Cir. 1980), *cert. denied*, 450 U.S. 912 (1981), 17 U.S.C. § 810, which provides for circuit court review of final decisions of the Copyright Tribunal "in a proceeding under section 801(b)," was constructed as conferring jurisdiction to review regulations issued under another provision. The court noted that appellate courts are well suited to consider a challenge based on the agency record, and that "[j]udicial resources would be wasted if parties could press their case upon the administrative agency, then obtain review on the agency record in the District Court, and then enjoy an appeal as of right to the Court of Appeals, which would perform precisely the same function." *Id.* at 534.

In this case, as well, the administrative record provides a fully adequate basis for judicial review. The Director's Decision clearly reflects a reasoned consideration of the merits of Ms. Lorion's allegations, and discloses the studies and analyses relied upon for their rejection. Since district court fact finding would be inappropriate in such a case,[14] no reasonable purpose would

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tinction in its original brief. Petition for Rehearing and Suggestion for Rehearing En Banc, filed in D.C. Circuit No. 82-1132, September 9, 1983, p. 3, n.2.

[14] Sierra Club v. Costle, 657 F.2d 298, 390 n.450 (D.C. Cir. 1981), holding that supplementation of the record is improper unless "no explanation for agency action appears on the record." *See* Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 420 (1971); Camp v. Pitts, 411 U.S. 138, 142-43 (1973).

be served by district court review. *See Investment Company Institute v. Board of Governors*, 551 F.2d 1270, 1276 (D.C. Cir. 1977).

This Court has itself avoided the inflexible approach taken by the court below and has interpreted various review statutes in accordance with good sense and judicial economy.[15] The statute considered by the court below is no less susceptible to an interpretation in keeping with precedent and policy. A Section 189a. "proceeding" for judicial review purposes under Section 189b. can logically be viewed as having taken place whenever, after having received a request to take any of the actions specified in Section 189a., the NRC undertakes a systematic process of consideration of the request culminating in its grant or denial. Sometimes the initial steps in that proceeding lead to an evidentiary hearing; other times they do not. So viewed, denial of a 2.206 request, like dismissal of a cause of action for failure to state a claim upon which relief could be granted, simply pretermits an already commenced proceeding before a pointless evidentiary hearing has been convened. No compelling purpose can be read into Section 189 requiring treatment of a proceeding terminated at this stage differently for purposes of judicial review than one decided at a later phase.

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[15] In Frozen Food Express v. United States, 351 U.S. 40, 44 (1956), for example, this Court held that interpretive rules issued by the Interstate Commerce Commission were subject to judicial review under a statute authorizing review of "orders" of the ICC. *Accord*, United States v. Storer Broadcasting Co., 351 U.S. 192, 195 (1956). And in Foti v. Immigration and Naturalization Service, 375 U.S. 217, 221 (1963), the Court held that a statute providing for review by the courts of appeals of "all final orders of deportation . . . made . . . pursuant to administrative proceedings under section 242(b) [8 U.S.C. § 1105a.)" was broad enough to confer jurisdiction over orders made outside the administrative proceeding.

The position that Section 189 can reasonably be construed as granting courts of appeals jurisdiction to review 2.206 denials as the "necessary first step" of a 189a. proceeding, or stated somewhat differently, as termination of an informal hearing on a contention which does not merit further adjudicatory procedures, is supported by the reasoning of several decisions. These cases establish that informal procedures, similar to those applied by the Director to Ms. Lorion's request, can satisfy the hearing requirements of Section 189a.[16] The conclusion of the court below that it had no jurisdiction over denial of a 10 CFR § 2.206 request merely because it was "informal" (App. 2; *see also* App. 13) and had not reached the stage of an evidentiary hearing, was, it is submitted, therefore erroneous.

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[16] The Section 2.206 process, which requires the NRC to consider public submissions and other relevant material in acting upon the enforcement request, is essentially the same as was held to be an informal hearing meeting Section 189a. requirements in City of West Chicago v. NRC, 701 F.2d 632 (7th Cir. 1983). In West Chicago, the city challenged the issuance of a materials license amendment. The NRC provided West Chicago with an opportunity to submit written comments. The city complained that Section 189a. required a formal adjudicatory hearing on all license amendment requests. The court rejected this argument and held that Section 189a. does not require a formal hearing for amendments to materials licenses. Similarly, in Siegel v. AEC, 400 F.2d 778 (D.C. Cir. 1968), petitioner's contention that Section 189a. requires formal hearings in rulemaking proceedings was rejected by the court on the ground that an adjudicatory hearing is neither expressly required by the terms of Section 189, nor by any clear indication of Congressional intent.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

HAROLD F. REIS
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October 28, 1983

APPENDIX

I. Judicial and Administrative Opinions

A. Opinion Below

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

No. 82-1132

JOETTE LORION, d/b/a CENTER FOR NUCLEAR RESPONSIBILITY
Petitioner,

v.

UNITED STATES NUCLEAR REGULATORY COMMISSION AND UNITED STATES OF AMERICA,
Respondents,

FLORIDA POWER & LIGHT COMPANY,
Intervenor.

Argued Nov. 18, 1982

Decided July 26, 1983

Petition for Review of an Order of the Nuclear Regulatory Commission

Martin H. Hodder, Miami, Fla., for petitioner.

Richard P. Levi, Atty., U.S. Nuclear Regulatory Com'n, Washington, D.C., with whom Leonard Bickwit, Jr., Gen. Counsel, E. Leo Slaggie, Acting Sol., U.S. Nuclear Regulatory Com'n, Peter R. Steenland, Jr., and Martin Green, Attys., Dept. of Justice, Washington, D.C., were on the brief, for respondents. James A. Fitzgerald, Atty., U.S. Nuclear Regulatory Com'n, and Dirk D. Snel, Atty., Dept. of Justice, Washington, D.C., also entered appearances for respondents.

Harold F. Reis and Steven P. Frantz, Washington, D.C., were on the brief, for intervenor. Norman A. Coll, Miami, Fla., also entered an appearance for intervenor.

Before MIKVA, Circuit Judge, MACKINNON, Senior Circuit Judge, and SWYGERT,* Senior Circuit Judge, United States Court of Appeals for the Seventh Circuit.

Opinion for the Court filed by Circuit Judge MIKVA.

MIKVA, Circuit Judge:

This case requires us to measure this court's authority to review directly an agency's refusal to institute regulatory proceedings. Joette Lorion, the petitioner, seeks review of a final decision of the Nuclear Regulatory Commission (NRC or Commission) denying her request that the Commission institute licensing review of Turkey Point Plant Unit Number 4 (Turkey Point), a nuclear reactor located near Miami, Florida. The jurisdictional bases of the petition for review are asserted to be 28 U.S.C. § 2342(4) (1976) and 42 U.S.C. § 2239(b) (1976) which together give this court authority to review directly those final orders of the NRC entered after formal agency proceedings. Because the Commission's decision in this case did not result from such a formal proceeding, however, we must dismiss this case for lack of subject matter jurisdiction.

BACKGROUND

In September 1981, the petitioner wrote the Commission to express her concern that the continued operation of the Turkey Point reactor near her home threatened her safety and the safety of her neighbors. Specifically, the petitioner's letter called attention to the possible leakage of Turkey Point's steam generator tubes and questioned the integrity of the reactor's steel pressure vessel. To address these concerns, the petitioner requested in her letter that the Commission (1) temporarily shut down the reactor for a steam generator inspection and (2) initiate a license review to consider the suspension of Turkey Point's operating license until such time as its

* Sitting by designation pursuant to 28 U.S.C. § 294(d).

operator, Florida Power and Light Company (FP & L), submitted proof of the reactor's safety.

The Commission treated the petitioner's letter as a specific enforcement request under section 2.206 of its rules of practice, 10 C.F.R. § 2.206 (1982), and referred the request to the NRC's Director of Nuclear Reactor Regulation. Section 2.206 provides a means by which any member of the public may request the Director of Regution to take enforcement action against a NRC licensee. Seven weeks later, however, the Director notified the petitioner that he was denying her request. Among the reasons given were that an inspection of Turkey Point's steam generator tubes had taken place since petitioner had sent her letter (thereby mooting that aspect of her request) and that the ongoing monitoring of the reactor's steam generator tubes and an upcoming study of the reactor's pressure vessel integrity were sufficient to protect the public's health and safety.

After unsuccessfully urging the Commission to review the Director's decision, the petitioner filed for review in this court. She asks that we set aside the Director's decision as arbitrary and capricious agency action that, in addition, was reached without affording her the benefit of a public hearing; alternatively, the petitioner contends that her letter was merely "advisory" and was not intended as a section 2.206 request. Moreover, the petitioner asserts in her brief that the Commission has failed to prepare an adequate environmental impact statement, as required by the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §§ 4321-4361 (1976 & Supp. IV 1980), for repairs made to Turkey Point's steam generators.

DISCUSSION

At the outset, it is important to note that our review is limited to the Commission's denial of the petitioner's request under section 2.206 of the NRC's rules of practice.

Accordingly, none of the petitioner's NEPA arguments are properly before us. These arguments were not raised by the petitioner in her letter of September 1981 and therefore played no role whatsoever in the agency action that the petitioner asks us to review. *See* Letter from Joette Lorion to the NRC (Sept. 11, 1981), Joint Appendix (JA) 1-2. This court long has recognized that our normal procedures allow only those contentions subjected to agency scrutiny during the administrative process to be entertained on judicial review. *See D.C. Transit System, Inc. v. Washington Area Transit Commission*, 466 F.2d 394, 413-14 (D.C.Cir.), *cert. denied*, 409 U.S. 1086, 93 S.Ct. 688, 34 L.Ed.2d 673 (1972). We also reject the petitioner's contention that her letter should not have been treated as a section 2.206 request because she had not formally labelled or addressed her letter as a "section 2.206 request" and had intended it to be merely "advisory." In promulgating its rules of practice, the Commission clearly expressed its intent to treat "any" request for the modification, suspension, or revocation of a license as a section 2.206 request, *see* 39 Fed. Reg. 12,353 (1974), and the court may rely upon this contemporaneous explanation of the scope of the agency's rules, *see Environmental Defense Fund, Inc. v. EPA*, 636 F.2d 1267, 1280 (D.C.Cir. 1980). Indeed, it would be a disservice to members of the interested public for the NRC to reject out of hand enforcement requests simply because they were not appropriately labelled and addressed. Thus, properly framed, the petition for review asks us to consider the Commission's treatment of the petitioner's September 1981 letter under 10 C.F.R. § 2.206.

Although the parties have not raised the issue, we nevertheless must determine our jurisdiction to review NRC denials of section 2.206 requests. It is axiomatic that federal courts of appeals are courts of limited jurisdiction "empowered to hear only those cases . . . entrusted to them by a jurisdictional grant by the Congress." 13

C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3522, at 44 (1975 ed.). Our jurisdiction to review administrative decisions of the NRC is straightforward. Under 28 U.S.C. § 2342(4) (1976), courts of appeals have authority to review "all final orders of the Atomic Energy Commission [now the NRC] made reviewable by section 2239 of title 42." Section 2239 of title 42 provides, in subsection (b), for judicial review in the court of appeals of "[a]ny final order entered in any proceeding of the kind specified in subsection (a)." 42 U.S.C. § 2239(b). Section 2239 designates, in subsection (a), those formal NRC "proceedings" in which a person may, upon request, demand a hearing. These proceedings include "any proceeding . . . for the granting, suspending, revoking, or amending of any license or construction permit . . . ." 42 U.S.C. § 2239(a). Thus, we may review the Commission's final order in this case, denying petitioner's request under 10 C.F.R. § 2.206, only if the order was entered in the kind of "proceeding" specified in 42 U.S.C. § 2239(a).

A. *The Nature of the Section 2.206 Process*

To appraise properly the relationship of section 2.206 requests to NRC "proceedings," it is helpful to describe briefly the regulatory framework into which section 2.206 fits. Under section 2.202 of the NRC's rules of practice, the Commission's various staff directors may "institute a proceeding to modify, suspend, or revoke a license . . . by serving on the licensee an order to show cause. . . ." 10 C.F.R. § 2.202(a) (1982). A show cause proceeding under section 2.202 constitutes a formal "proceeding" under 42 U.S.C. § 2239(a) and, upon timely demand, the Commission must grant the licensee a hearing. *See* 10 C.F.R. § 2.202(b)-(c). In 1974, the Commission adopted section 2.206 specifically to provide a mechanism for members of the public to request the Director of Regulation to institute a section 2.202 proceeding:

> Any person may file a request for the Director of Regulation to institute a proceeding pursuant to § 2.202 to modify, suspend, or revoke a license or for such other action as may be proper. . . . The requests shall specify the action requested and set forth the facts that constitute the basis for the request.

10 C.F.R. § 2.206(a) (1982); *see* 39 Fed. Reg. 12,353 (1974).

Although the Commisison has interpreted section 2.206 to require issuance of a show cause order when "substantial health or safety issues have been raised," *Consolidated Edison Co.*, 2 N.R.C. 173, 176 (1975), the Commission has never required that this determination be made pursuant to a hearing, *see, e.g., Northern Indiana Public Service Co.* (Bailly Generating Station, Nuclear-1), 7 N.R.C. 429, 432-33 (1978). Instead, the Director of Regulation has considerable discretion to make whatever unilateral inquiries he or she deems necessary. Provided that this discretion is not abused, the Director "is free to rely on a variety of sources of information, including staff analysis of generic issues, documents issued by other agencies, and the comments of the licensee on the factual allegations." *Id.* The language of section 2.206 merely requires that

> Within a reasonable time after a request pursuant to paragraph (a) of this section has been received, the Director of Regulation shall either institute the requested proceeding . . . or shall advise the person who made the request that no proceeding will be instituted in whole or in part . . . and the reasons therefor.

10 C.F.R. § 2.206(b) (1982). In short, a section 2.206 request triggers a preliminary investigation by the NRC's staff to determine whether or not a formal proceeding should be instituted.

In light of the language and function of section 2.206, both this court and the Seventh Circuit have affirmed the Commission's refusal to hold hearings on section 2.206 requests; the Commission's processing of such requests repeatedly has been held *not* to constitute a "proceeding" under 42 U.S.C. § 2239(a). In *Illinois v. Nuclear Regulatory Commission*, 591 F.2d 12 (7th Cir. 1979), for example, the court held that hearings on section 2.206 requests were properly denied because the requests did not involve "agency action which, according to that agency's governing statute, must be preceded by a hearing." *Id.* at 14. Similarly, in *Porter County Chapter of the Izaak Walton League v. Nuclear Regulatory Commission (Porter County)*, 606 F.2d 1363 (D.C.Cir.1979), this court held that the procedural accoutrements of a statutory "proceeding" were inapplicable to section 2.206 requests because "[t]he agency is not bound to launch full-blown proceedings simply because a violation of the statute is claimed. It may properly undertake preliminary inquiries in order to determine whether the claim is substantial enough under the statute to warrant full proceedings." *Id.* at 1369 & n. 16 (noting that the result is "congruent with that . . . in *Illinois v. NRC*") Relying on both of these decisions, the Commisison maintains in the present case that the petitioner was not entitled to a hearing on her section 2.206 request. As the Commission succinctly puts it: "A request for an enforcement proceeding is just that—a request. Unless and until granted, it is not a 'proceeding' where the requester has any right to present evidence." Government Brief at 24-25.

B. *Caselaw Regarding Subject Matter Jurisdiction*

Neither the *Porter County* nor *Illinois v. NRC* court discussed the issue of subject matter jurisdiction. Yet, given this court's holding in *Porter County* that section 2.206 requests do not entail "proceedings" under 42 U.S.C. § 2239(a), it would logically follow that we must dis-

miss petitions to review such requests for lack of jurisdiction: 42 U.S.C. § 2239(b) expressly limits our reviewing authority to final orders entered pursuant to the kind of "proceedings" specified in 42 U.S.C. § 2239(a). The logic of the jurisdictional statute, however, has been conveniently distorted in a separate line of authority.

In *Natural Resources Defense Council, Inc. v. Nuclear Regulatory Commission (NRDC v. NRC)*, 606 F.2d 1261 (D.C.Cir.1979), this court held that it had exclusive jurisdiction to review a NRC decision denying a request by the Natural Resources Defense Council (NRDC) for the Commission to license certain tanks constructed for the storage of high-level radioactive waste. The Commission had denied the NRDC's request because the NRC's licensing jurisdiction extends only to storage tanks authorized for long-term storage, *see* 42 U.S.C. § 5842(4) (1976), and the tanks in question were intended only for short-term storage, *see* 606 F.2d at 1264. Stating that "a licensing jurisdiction determination is a necessary first step in any proceeding for the granting of a license," this court found that the NRC's decision "was 'entered in a proceeding' for 'the granting . . . of any license' " under 42 U.S.C. § 2239(a) and thus within the reviewing jurisdiction of this court under 42 U.S.C. § 2239(b).

Our decision in *NRDC v. NRC* was scrutinized recently by the Seventh Circuit in *Rockford League of Women Voters v. Nuclear Regulatory Commission (Rockford)*, 679 F.2d 1218 (7th Cir.1982). At issue in *Rockford* was the Commission's denial of a section 2.206 request that the Commission institute proceedings to revoke the construction permit of a partially completed reactor because of allegedly unresolved safety issues. Although Judge Posner, writing for the *Rockford* court, upheld the Commission's decision, he correctly noted the jurisdictional implications of *Porter County* and *Illinois v. NRC:* "At least on a literal reading of section 2239(b), the Director's action in denying the petitioner's request to initi-

ate a revocation proceeding was not an order, final or otherwise, in a section 2239 proceeding; it was a refusal to initiate such a proceeding. . . ." *Id.* at 1220. Moreover, Judge Posner added:

> A ruling that the courts of appeals lack jurisdiction to review the Director's refusal to initiate a revocation proceeding would not leave the petitioner remediless. The League could still bring suit in district court under 28 U.S.C. § 1331, the general federal-question jurisdiction statute, see *Izaak Walton League of America v. Schlesinger*, 337 F.Supp. 287, 291-92 (D.D.C.1971); *Gage v. Commonwealth Edison Co.*, 356 F.Supp. 80, 84 (N.D.Ill.1972); *Gage v. AEC*, *supra*, 479 F.2d [1214] at 1222, and perhaps under other statutes, such as 28 U.S.C. § 1337 (acts regulating commerce), as well. The district court is arguably the more appropriate venue for a proceeding to review informal agency action, of which agency inaction is a conspicuous example. In deciding not to initiate a proceeding to revoke the Byron construction permit, the Director of Nuclear Reactor Regulation naturally did not compile the kind of formal record that is the usual predicate for reviewing agency action in the courts of appeals. To decide whether he abused his discretion it might be necessary to reconstruct the informal record on which he based his decision. The district courts are better suited to perform that task than the courts of appeals See *Susquehanna Valley Alliance v. Three Mile Island Nuclear Reactor*, 619 F.2d 231, 241 (3d Cir.1980).

Id. at 1220-21. Despite these misgivings, the *Rockford* court concluded "primarily on the authority of [*NRDC v. NRC*]" that district courts were precluded from asserting jurisdiction to review the NRC's section 2.206 decisions because of the exclusive jurisdiction over licensing "proceedings" lodged in the courts of appeals. *Id.* at 1221.

Although Judge Posner noted that the holding in *NRDC v. NRC* "admittedly does some violence to the language of 42 U.S.C. § 2239(b)," and suggested that he might be "somewhat inclined as an original matter to come out the other way," he interpreted "proceeding" in section 2239(b) to encompass the informal section 2.206 process in order to avoid creating a conflict between the circuits and because he felt that an extra level of district court review would be simply "too much." 679 F.2d at 1221.

Shortly after *Rockford* was decided, this court again addressed its jurisdiction to review the NRC's section 2.206 decisions in *Seacoast Anti-Pollution League of New Hampshire v. Nuclear Regulatory Commission* (*Seacoast*), 690 F.2d 1025 (D.C. Cir. 1982). At issue in *Seacoast* was a section 2.206 request that the Commission institute a proceeding to revoke the construction permits for a non-operational reactor because the permits did not include an adequate evacuation plan. In sustaining the Commission's denial of this request, we acknowledged that this court has jurisdiction "only if the Commission's final order was entered in a proceeding for the revoking of the construction permits." 690 F.2d at 1028. After reciting the statutory requirement, however, we referred to *NRDC v. NRC* and *Rockford* and concluded that the Commission's refusal to institute a section 2239(a) revocation proceeding was nonetheless a "necessary first step" in any revocation proceeding and hence reviewable under 42 U.S.C. § 2239(b). 690 F.2d at 1028.

C. *Resolving the Conflict Among* Porter County, NRDC v. NRC, Seacoast, *and the Jurisdictional Language in 42 U.S.C. § 2239*

Upon reflection, we are no longer comfortable with the strain our decisions have placed on the clear-cut language of 42 U.S.C. § 2239. By applying to section 2.206 requests the "necessary first step" rationale employed by this court in *NRDC v. NRC*, the Seventh Circuit in *Rockford* and this court in *Seacoast* have interpreted "proceeding" in section 2239(b) as encompassing the informal process commenced by the filing of a section 2.206 request. *See Rockford*, 679 F.2d at 1221. Yet, the statutory language of 42 U.S.C. § 2239(b) explicitly restricts our reviewing jurisdiction to those final orders entered in the kinds of formal "proceedings" specified in 42 U.S.C. § 2239(a). This unusual, interlocking scheme does not allow "proceeding" to mean one thing for procedural purposes and another for jurisdictional purposes. Accordingly, we cannot rely on our constructions of other statutory schemes—usually requiring interpretation of a simple, jurisdictional grant to review agency "orders"—in which Congress impliedly may have intended broader meanings to attend the same words in jurisdictional sections than in other sections. *See, e.g., Investment Company Institute v. Board of Governors of the Federal Reserve System*, 551 F.2d 1270, 1276-81 (D.C. Cir. 1977) (construing the word "order" more broadly in jurisdictional section than in other, non-related sections of the Bank Holding Act of 1956); *cf. City of Rochester v. Bond*, 603 F.2d 927, 933 n. 26 (D.C. Cir. 1979) (courts sometimes construe "order" for purposes of special review provisions more expansively than its definition in the Administrative Procedure Act). Nor may we read out the unusual cross-reference in 42 U.S.C. § 2239 by relying on cases generally confirming the institutional ability of this court to review informal agency action. *See, e.g., Environmental Defense Fund, Inc. v. Hardin*, 428 F.2d 1093, 1098-99 (D.C. Cir. 1970). Our inferences of Congress' jurisdictional choices operate only "in those cases not plainly governed by statutory language or history." *City of Rochester v. Bond*, 603 F.2d at 935. In the present case, we are confronted with a peculiar jurisdictional statute which precludes us from interpreting "proceedings" in 42 U.S.C. § 2239(b) with the same latitude with which we have legitimately interpreted such terms as "orders" or "final orders" in other statutes. Here, Congress has explicitly referenced its use of the word "proceeding" in the statute's jurisdictional section

to the kinds of "proceedings" specified in the statute's procedural section. Thus, we are presented with one of those unusual statutes "which define a reviewable order with such limiting circumstantiality that a number of determinative agency actions cannot possibly be squared with the requirements." L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 422 (Abridged Student Ed. 1965).

Given this unusually self-contained statutory scheme, there is no room in which to import the well-founded presumption against bifurcation of judicial forums. However economical we may find exclusive court of appeals review of the NRC's section 2.206 decisions to be, it is one thing to read notions of judicial economy into statutory terms capable of assimilating them and quite another to read out Congress' jurisdictional terms in order to accommodate our own policy preferences. To paraphrase an opinion by Judge Posner issued shortly after his opinion in *Rockford*, the precise statutory provision by which Congress has granted exclusive jurisdiction to courts of appeals "is not some mindless, irksome technicality that we should try to construe our way around." *Denberg v. Railroad Retirement Board*, 696 F.2d 1193, 1196 (7th Cir. 1983). The conclusion of this court in *Porter County* that section 2.206 requests do not entail "proceedings" under 42 U.S.C. § 2239(a) for procedural purposes, 606 F.2d at 1369, and the Commission's reiteration in the present case that "[u]nless and until granted, a [request for enforcement] is not a 'proceeding' where the requester has any right to present evidence," Government Brief at 24-25, precludes this court from viewing the section 2.206 process as a "necessary" part of the NRC's formal licensing proceedings for jurisdictional purposes. *Cf. Foti v. Immigration and Naturalization Service*, 375 U.S. 217, 232, 84 S.Ct. 306, 315, 11 L.Ed.2d 281 (1965) (in light of compelling legislative history, court of appeals jurisdiction over "final orders of deportation" included jurisdiction over administrative

determination historically and consistently made as an integral part of the formal deportation hearings). There is no evidence in the sparse legislative history surrounding the passage of 42 U.S.C. § 2239 to suggest that Congress envisioned its jurisdictional grant in section 2239(b) to extend beyond orders entered in formal hearings. *Compare* 42 U.S.C. § 2239(b) (1976) (final version of § 189 of the Atomic Energy Act of 1954) *with* H.R. 8862, 83d Cong., 2d Sess. § 189 (1954), *reprinted in* I *Legislative History of the Atomic Energy Act of 1954* (*Legislative History*) at 105, 167-68 (1955) (unenacted version of § 189, as introduced, providing for review in the courts of appeals of "any proceeding to enjoin, set aside, annul, or suspend any order of the Commission") *and* H.R. 9757, 83d Cong., 2d Sess. § 189 (1954) (unenacted version of § 189, as introduced, providing for review in the courts of appeals of "[a]ny final order granting, denying, suspending, revoking, modifying, or rescinding any license."). *See generally* H.R.Rep. No. 2181, 83d Cong., 2d Sess. (1954); S.Rep. No. 1699, 83d Cong., 2d Sess., *reprinted in* [1954] U.S. Code Cong. & Admin. News 3456; 100 Cong. Rec. 10685-86 (1954).

Thus, in light of the specific jurisdictional grant given to us by Congress in 42 U.S.C. § 2239(b), we can no longer reconcile the "necessary first step" rationale of *Natural Resources Defense Council, Inc. v. Nuclear Regulatory Commission*, 606 F.2d 1261 (D.C. Cir. 1979) and *Seacoast Anti-Pollution League of New Hampshire v. Nuclear Regulatory Commission*, 690 F.2d 1025 (D.C. Cir. 1982) with our holding in *Porter County Chapter of the Izaak Walton League v. Nuclear Regulatory Commission*, 606 F.2d 1363 (D.C. Cir. 1979) and the Commission's steadfast insistence that the section 2.206 process does not entail a "proceeding" within the meaning of 42 U.S.C. § 2239(a). Accordingly, we hold that this court is without subject matter jurisdiction to review directly the Commission's section 2.206 decisions under

42 U.S.C. § 2239(b).** To avoid misunderstanding, however, we emphasize that we are not holding today that the NRC's denials of section 2.206 requests are unreviewable. A requester allegedly injured by the NRC's refusal to institute licensing proceedings is presumptively entitled to judicial review for agency action asserted to be arbitrary, capricious, an abuse of discretion, or not in accordance with law. In the absence of any applicable statute prescribing review in a particular court—which is the case here regarding the NRC's denials of section 2.206 requests—"nonstatutory" review may be sought in district court under any applicable jurisdictional grant, *see City of Rochester v. Bond*, 603 F.2d at 931. As Judge Posner indicated in *Rockford*, district court review of the NRC's section 2.206 decisions could be predicated on the general federal question jurisdictional statute, 28 U.S.C. § 1331 (Supp. V 1981) and, possibly, under the jurisdictional grant regarding acts of commerce, 28 U.S.C. § 1337 (1976), as well. This court, of course, would then be able to review the decisions of the district court under 28 U.S.C. § 1291 (1976).

It may well be that Congress will want to amend its jurisdictional grant in 42 U.S.C. § 2239(b) to allow courts of appeals to review directly the NRC's denials of section 2.206 requests. Or Congress may want to leave

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** Because this holding resolves an unavoidable conflict among these prior decisions, this part of our opinion has been separately considered and approved by the full court, and thus constitutes the law of the circuit. We wish to make clear, however, that our change of course today does not upset the *res judicata* effect of our prior decisions, on the merits, on the parties in *NRDC v. NRC*, *Porter County*, or *Seacoast*. *Cf. Chicot County Drainage District v. Baxter State Bank*, 308 U.S. 371, 60 S.Ct. 317, 84 L.Ed. 329 (1940) (*res judicata* applied to prior decisions of lower court under jurisdictional statute subsequently declared unconstitutional); Restatement (Second) of Judgments § 12 (1982) (interests in finality can operate to give *res judicata* effect to decisions resting on incorrect subject matter jurisdiction determinations).

jurisdiction over such informal decisions in district courts. Our opinion today merely holds that the statutory limitations on our present jurisdiction in 42 U.S.C. § 2239(b) make it a decision for Congress, and not for this court, to make. The present case is therefore dismissed from this court for lack of subject matter jurisdiction and transferred to the federal District Court for the District of Columbia pursuant to 28 U.S.C.A. § 1631 (West 1983).

It is so ordered.

B. Director's Decision

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14 NRC 1078 (1981)

DD-81-21

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF NUCLEAR REACTOR REGULATION

Harold R. Denton, Director

Docket No. 50-251 (10 CFR 2.206)

In the Matter of

FLORIDA POWER AND LIGHT COMPANY
(Turkey Point Plant, Unit 4)

November 5, 1981

The Director of the Office of Nuclear Reactor Regulation denies a petition under 10 CFR 2.206 which requested the Commission (1) to order an immediate shutdown of Turkey Point Plant, Unit 4, to inspect the steam generator tubes, and (2) to consider the suspension of the operating license of Turkey Point Plant, Unit 4, because of concerns over the safety of the reactor pressure vessel.

DIRECTOR'S DECISION UNDER 10 CFR 2.206

By a letter dated September 11, 1981, signed by Joette Lorion, the Center for Nuclear Responsibility (Center), which is located in South Miami, Florida, petitioned the Nuclear Regulatory Commission to take the following actions in relation to Turkey Point Plant, Unit 4 (Unit 4):

1) Immediately order a shutdown to inspect the steam generator tubes; and

2) Consider the suspension of the plant's operating license because of concerns over the safety of the reactor pressure vessel.

The petition was referred by the Commission to the Director, Office of Nuclear Reactor Regulation, for action in accordance with 10 CFR 2.206 of the Commission's regulations.

I. Requested Shutdown for Steam Generator Inspection

In summary, the background of the steam generator problem is as follows:

> In the mid-1970's, a number of nuclear power plants, including Turkey Point Plant Unit Nos. 3 and 4, began to have problems with leaking steam generator tubes due to a corrosive process called "denting." On October 29, 1976, the NRC staff set forth minimum requirements to ensure that Units 3 and 4 would not, as a result of this denting phenomenon, operate with reduced integrity of the primary system pressure boundary. Since that time the plants have operated under strict requirements imposed by the NRC staff.[1]

Under the terms of these requirements, Florida Power and Light Company (FPL) has received permission for short-term extensions of operation for Unit Nos. 3 and 4 in the form of license amendments. Following shutdown, inspection and plugging of tubes that were judged by the licensee to be in danger of leaking in the ensuing 10 months, and NRC staff analysis of the inspection and plugging, license amendments were granted to allow six months of full power equivalent operation. Subject to operating experience which indicated that further operation before shutdown and inspection would not endanger public health and safety, additional extensions have also

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[1] Florida Power and Light Company (Turkey Point Plant, Unit 3), DD-80-28, 12 NRC 386, 388 (1980).

been granted, for totals of up to 10 months of full power equivalent operation between inspections.

FPL reported on the last previous inspection of Unit 4, which they performed in November, 1980, in a letter to the Commission dated December 18, 1980. The letter also contained a request for continued operation of Unit 4. After reviewing the inspection results, NRC issued Amendment 54 to License No. DPR-41 on January 15, 1981. Amendment 54 allowed continued operation for six equivalent full power months, commencing January 13, 1981. Operation beyond the six-month period without further inspection was also anticipated and permitted in Amendment 54, but subject to the requirement that "an acceptable analysis of the susceptibility for stress corrosion cracking of tubing is submitted to explicitly justify continued operation of Unit 4 beyond the authorized period of operation."[2]

In response to a FPL request dated May 27, 1981 for a four-month extension of operating permission, the NRC staff again reviewed the status of the steam generators in Unit 4. Based upon this re-review, an extension for two equivalent full power months was granted in Amendment 62, dated July 6, 1981.

On July 30, 1981, FPL requested an additional two months operation for Unit 4. Again the NRC staff reviewed the status of the steam generators and based upon this re-review, an additional extension of two equivalent full power months was granted in Amendment 66, dated September 10, 1981. Amendment 66 allowed operation for ten equivalent full power months from January 13, 1981.

An important factor underlying the decision to grant the extensions authorized by Amendment 62 and 66 has

[2] Facility Operating License No. DPR-41, as amended by Amendment 54, paragraph D(1).

been the continued essentially leak-free operation of the steam generators throughout the period in question.

Most recently, on October 19, 1981, FPL has shut down Unit 4 and commenced an inspection of the steam generators. Thus, the request in the petition for a shutdown to inspect the steam generators is now moot.

II. Petitioner's Allegations Concerning Steam Generator Safety

The Center in its petition makes a number of allegations concerning the safety of the steam generators in Unit No. 4.

The first is that Unit 4 is operating with "nearly 25 percent of its steam generator tubes plugged and removed from service. This reduction in heat transfer area could cause this unit to be more susceptible to overheating, necessitating emergency cooling." The Center also states that the steam generator tubes will continue to deteriorate.

FPL sought by application dated April 29, 1980, to operate Unit 4 with 25 percent of steam generator tubes plugged. The staff concluded that operation of Turkey Point Unit No. 4 with up to 25 percent of the tubes plugged is acceptable[3] and issued Amendment 50 to the license, dated May 15, 1980, which permitted operation with 25 percent of the tubes plugged. A total of 23.8 percent of the tubes were plugged prior to Amendment 54 and the recently concluded period of operation.[4]

[3] Safety Evaluation by the Office of Nuclear Reactor Regulation Related to Amendments 57 and 50 to Facility Operating Licenses Nos. DPR-31 and DPR-41. (May 15, 1980).

[4] Safety Evaluation by the Office of Nuclear Reactor Regulation Related to Amendment No. 54 to Facility Operating License No. DPR-41, page 4 (January 15, 1981).

Subsequent safety analysis by the staff of FPL's application for Amendment dated March 5, 1981, showed that operation with 28 percent of the tubes plugged is acceptable. Operation with this level of tube plugging was permitted in Amendment 60, dated June 23, 1981.

The safety analysis supporting Amendment 60 does not imply that plugging of more than 28 percent of the tubes would be unsafe; the analysis was performed at the 28 percent level because it is expected that the 28 percent limit will be fully sufficient to allow plugging of all tubes which the current inspection of Unit 4 will show might be susceptible to leaking in the foreseeable future.[5] The plugging is, and has been, carried out by the licensee as a prophylactic program, and it has been successful in preventing leakage since mid-1978.[6]

The Center in its letter quotes the NRC to the effect that, "We do not have an adequate technical basis to predict steam generator performance for periods longer than six months." While the author of the letter does not identify the source of the quotation, a virtually identical statement was made in NRC, *Safety Evaluation by the Office of Nuclear Reactor Regulation Related to Amendment No. 52 to Facility Operating License No. DPR-31.*[7] The latter statement, however, continues, ". . . and that our consideration of extended operation beyond six (6)

[5] Safety Evaluation by the Office of Nuclear Reactor Regulation Relating to Amendment No. 68 to Facility Operating License No. DPR-31 and Amendment No. 60 to Facility Operating License No. DPR-41 (June 23, 1981). It is expected that approximately 2 percent additional plugging will be required in Unit 4 beyond the current 23.8 percent.

[6] Safety Evaluation by the Office of Nuclear Reactor Regulation Relating to Amendment No. 66 to Facility Operating License No. DPR-41 (September 10, 1981).

[7] Unit 3 has the same design steam generator as Unit 4 with substantially similar degradation experience.

months would depend upon the operating experience at this and similarly degraded units." This last quotation reflects the consistent policy of the Commission in relation to Turkey Point Units Nos. 3 and 4. Thus statements concerning six-month maximum prediction period, such as the one quoted by the Center, must be taken in context. In context, it is clear the six-month initial period of operation after an inspection of steam generators may be followed by extensions, provided the technical basis supplied by the licensee, and the relevant operating experience, justify the extensions. This course of action has been followed in relation to Turkey Point Units No. 3 and 4 since 1977[8] and satisfactorily protects the public health and safety.

The Center further asserts that the "steam generator tubes [of Unit 4] may be on the verge of leaking"; and that, according to a 1975 study by the Union of Concerned Scientists (study not further identified in the Center's letter), rupture of "a handful of tubes" would result in a core melt, with very serious public safety results.

The Staff, based on its studies, does not anticipate that a "handful of tubes" will rupture ("handful" is undefined in the petition), or that such an event, if it should occur, would cause a core melt. Neither does the petitioner advance any factual basis for anticipating such events. Isolated breaks of single tubes which could be described by the word "rupture" have occurred in steam generators similar to those of Unit 4. In these instances, however, the reactors have been shut down in an orderly fashion.

As indicated above, the steam generator tubes of Unit 4 are being regularly monitored. Moreover, the license for Unit 4 requires a cold shutdown if leakage exceeds

[8] Florida Power and Light Company (Turkey Point Plant, Unit 3), DD-80-28, 12 NRC 386 (1980).

the prescribed limit of 0.3 gpm per steam generator.[9] Staff is of the view that the 0.3 gpm leakage limit, and actions required should this rate be exceeded (along with the monitoring previously described), are fully adequate to protect the health and safety of the public.[10]

Finally, the Center asserts in its letter that steam generator tube integrity is an unresolved safety issue. While it is true that the problem of steam generator tube integrity is not fully resolved, the problem has received careful ongoing review and analysis, as described above. Accordingly, and in view of the history of the steam generators of Unit 4, further action by NRC regarding Unit 4's steam generators is unnecessary at this time. The procedures and safeguards instituted in relation to that problem are sufficient to safeguard the public health and safety.[11]

III. Requested Action With Reference to Reactor Pressure Vessel

The Center asserts that Turkey Point Unit No. 4 is one of a number of nuclear power plants "whose steel pressure vessel may be vulnerable to cracking or shattering caused by thermal shock in the event of an accident that requires high pressure injection emergency cooling." The petition further cites pressure vessel safety as an unresolved safety issue.

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[9] Facility Operating License No. DPR-41, as amended, paragraph D(2).

[10] Safety Evaluations, footnotes 3 and 5, *supra*.

[11] NRC Regulatory Guide 1.83 contains the standard procedures for inspecting steam generators, which standards are considered adequate by NRC for protecting the public health and safety. The procedures which have been developed for Turkey Point and inserted in Unit 4's operating license as mandatory requirements are significantly more rigorous than the procedures in Regulatory Guide 1.83, and therefore provide an additional margin of safety.

During the past few months the subject of reactor pressure vessel thermal shock has received increased attention by the NRC staff and industry representatives. The NRC staff has recently evaluated (1) the types of transients or accidents that could lead to overcooling of the reactor system; (2) experience to date with transients that have occurred in U.S. pressurized water reactors; (3) the probability that such overcooling events will occur; and (4) the capability of reactor vessels to withstand these transients.

As a result of its evaluations to date, the staff has concluded that the probability of a severe overcooling transient is relatively low. For Babcock & Wilcox designed reactors this probability is estimated to be about 10^{-3} per reactor per year, and for Westinghouse and Combustion Engineering designed reactors, it is lower, perhaps by an order of magnitude. The staff has also concluded that, based on present irradiation levels at operating reactors, reactor vessel failure from such an event in the near term is unlikely. Therefore, no immediate licensing action is required for operating reactors including Unit 4.[12]

However, the staff believes that additional action should be taken to resolve the long-term problem. Toward this end, the staff, the Pressurized Water Reactor (PWR) owners' group, and PWR vendors are working together to determine the scope of the generic pressure vessel problem. In addition, plants with the most limiting condition (in terms of assured period of continued safe operation) in each vendor's group have been selected for individual study. Unit 4 having been selected as one of the plants for plant-specific study, a letter dated August 21, 1981, was sent to require the licensee in accordance with 10 CFR 50.54(f) of the Commission's regulations to

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[12] *Preliminary Assessment of Thermal Shock to PWR Reactor Pressure Vessels*, SECY 81-286 (May 4, 1981).

submit information for review. Based upon the generic and plant-specific studies and reviews, NRC will take timely action in relation to the reactor vessel problem.

IV. Request for "License Review"

The letter from the Center also asked:

> that the Nuclear Regulatory Commission take steps to immediately initiate a license review of this nuclear reactor unit [Unit 4]. It is the responsibility of the Nuclear Regulatory Commission to protect the public health and safety, and this can only be accomplished if adequate safety systems exist to protect the public in case of an accident . . . . We hope at this point the NRC will derate the unit, so that it doesn't operate in an unsafe manner.

Requests for a "license review" and to "derate the unit" appear to be synonymous with the request that the NRC consider the suspension of the license of Unit 4. Other than the assertions which have been discussed above concerning the steam generators and reactor vessel, the petitioner advances no facts that relate to possible safety inadequacies.

V. Conclusion

Based on the foregoing discussion, I have determined that the petitioner's request for an order to shut down the Turkey Point Plant Unit 4 to inspect steam generator tubes should be and is hereby denied. Further, based upon the staff analyses of the Reactor Vessel question, I have also concluded that the petitioner's request for consideration of suspension of the license of Turkey Point Unit No. 4 should also be denied.

A copy of this decision will be placed in the Commission's Public Document Room at 1717 H Street, N.W., Washington, D.C. 20555 and the local public document

room for the Turkey Point Plant located at the Environmental Urban Affairs Library, Florida International University, Miami, Florida 33199. A copy of this decision will also be filed with the Office of the Secretary of the Commission for its review in accordance with 10 CFR 2.206(c) of the Commission's regulations.

FOR THE NUCLEAR
REGULATORY COMMISSION

Harold R. Denton, Director
Office of Nuclear Reactor Regulation

Dated at Bethesda, Maryland
this 5th day of November, 1981.

II. Statutes and Regulations

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28 U.S.C. § 2342(4) (1976)

§ 2342. Jurisdiction of court of appeals

The court of appeals has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of—

• • • •

(4) all final orders of the Atomic Energy Commission made reviewable by section 2239 of title 42; and

• • • •

42 U.S.C. § 2239 (1976 & West Supp. 1983)

§ 2239. Hearings and judicial review

(a)(1) In any proceeding under this chapter, for the granting, suspending, revoking, or amending of any license or construction permit, or application to transfer control, and in any proceeding for the issuance or modification of rules and regulations dealing with the activities of licensees, and in any proceeding for the payment of compensation, an award or royalties under sections 2183, 2187, 2236(c) or 2238 of this title, the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to such proceeding. The Commission shall hold a hearing after thirty days' notice and publication once in the Federal Register, on each application under section 2133 or 2134(b) of this title for a construction permit for a facility, and on any application under section 2134(c) of this title for a construction permit for a testing facility. In cases where such a construction permit has been issued following the holding of such a hearing, the Commission may, in the

absence of a request therefor by any person whose interest may be affected, issue an operating license or an amendment to a construction permit or an amendment to an operating license without a hearing, but upon thirty days' notice and publication once in the Federal Register of its intent to do so. The Commission may dispense with such thirty days' notice and publication with respect to any application for an amendment to a construction permit or an amendment to an operating license upon a determination by the Commission that the amendment involves no significant hazards consideration.

(2)(A) The Commission may issue and make immediately effective any amendment to an operating license, upon a determination by the Commission that such amendment involves no significant hazards consideration, notwithstanding the pendency before the Commission of a request for a hearing from any person. Such amendment may be issued and made immediately effective in advance of the holding and completion of any required hearing. In determining under this section whether such amendment involves no significant hazards consideration, the Commission shall consult with the State in which the facility involved is located. In all other respects such amendment shall meet the requirements of this chapter.

(B) The Commission shall periodically (but not less frequently than once every thirty days) publish notice of any amendments issued, or proposed to be issued, as provided in subparagraph (A). Each such notice shall include all amendments issued, or proposed to be issued, since the date of publication of the last such periodic notice. Such notice shall, with respect to each amendment or proposed amendment (i) identify the facility involved; and (ii) provide a brief description of such amendment. Nothing in this subsection shall be construed to delay the effective date of any amendment.

(C) The Commission shall, during the ninety-day period following the effective date of this paragraph, promulgate regulations establishing (i) standards for determining whether any amendment to an operating license involves no significant hazards consideration; (ii) criteria for providing or, in emergency situations, dispensing with prior notice and reasonable opportunity for public comment on any such determination, which criteria shall take into account the exigency of the need for the amendment involved; and (iii) procedures for consultation on any such determination with the State in which the facility involved is located.

• • • •

(b) Any final order entered in any proceeding of the kind specified in subsection (a) of this section shall be subject to judicial review in the manner prescribed in the Act of December 29, 1950, as amended, and to the provisions of section 10 of the Administrative Procedure Act, as amended.

10 C.F.R. § 2.202 (1983)

§ 2.202 Order to show cause.

(a) The Executive Director for Operations during an emergency as determined by the EDO, and Director of Nuclear Reactor Regulation, Director of Nuclear Material Safety and Safeguards, Director, Office of Inspection and Enforcement, and Director, Office of Administration, as appropriate may institute a proceeding to modify, suspend, or revoke a license or for such other action as may be proper by serving on the licensee an order to show cause which will:

(1) Allege the violations with which the licensee is charged, or the potentially hazardous conditions or other facts deemed to be sufficient ground for the proposed action;

(2) Provide that the licensee may file a written answer to the order under oath or affirmation within twenty (20) days of its date, or such other time as may be specified in the order;

(3) Inform the licensee of his right, within twenty (20) days of that date of the order, or such other time as may be specified in the order, to demand a hearing;

(4) Specify the issues; and

(5) State the effective date of the order.

(b) A licensee may respond to an order to show cause by filing a written answer under oath or affirmation. The answer shall specifically admit or deny each allegation or charge made in the order to show cause, and may set forth the matters of fact and law on which the licensee relies. The answer may demand a hearing.

(c) If the answer demands a hearing, the Commission will issue an order designating the time and place of hearing.

(d) An answer or stipulation may consent to the entry of an order in substantially the form proposed in the order to show cause.

(e) The consent of the licensee to the entry of an order shall constitute a waiver by the licensee of a hearing, findings of fact and conclusions of law, and of all right to seek Commission and judicial review or to contest the validity of the order in any forum. The order shall have the same force and effect as an order made after hearing by a presiding officer or the Commission.

(f) When the Executive Director for Operations, during an emergency as determined by the EDO, or the Director of Nuclear Reactor Regulation, Director of Nuclear Material Safety and Safeguards, Director, Office of Inspection and Enforcement, as appropriate, finds that the public health, safety, or interest so requires or that

the violation is willful, the order to show cause may provide, for stated reasons, that the proposed action be temporarily effective pending further order.

10 C.F.R. § 2.206 (1983)

§ 2.206 Requests for action under this subpart.

(a) Any person may file a request for the Director of Nuclear Reactor Regulation, Director of Nuclear Material Safety and Safeguards, Director, Office of Inspection and Enforcement, as appropriate, to institute a proceeding pursuant to § 2.202 to modify, suspend or revoke a license, or for such other action as may be proper. Such a request shall be addressed to the Director of Nuclear Reactor Regulation, Director of Nuclear Material Safety and Safeguards, Director, Office of Inspection and Enforcement, as appropriate, and shall be filed either: (1) By delivery to the Public Document Room at 1717 H Street N.W., Washington, D.C., or (2) by mail or telegram addressed to the Director of Nuclear Reactor Regulation, Director of Nuclear Material Safety and Safeguards, Director, Office of Inspection and Enforcement, as appropriate, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555. The requests shall specify the action requested and set forth the facts that constitute the basis for the request.

(b) Within a reasonable time after a request pursuant to paragraph (a) of this section has been received, the Director of Nuclear Reactor Regulation, Director of Nuclear Material Safety and Safeguards, Director, Office of Inspection and Enforcement, as appropriate shall either institute the requested proceeding in accordance with this subpart or shall advise the person who made the request in writing that no proceeding will be instituted in whole or in part, with respect to his request, and the reasons therefor.

(c) (1) Director's decisions under this section will be filed with the Office of the Secretary. Within twenty-five (25) days after the date of the Director's decision under this section that no proceeding will be instituted or other action taken in whole or in part, the Commission may on its own motion review that decision, in whole or in part, to determine if the Director has abused his discretion. This review power does not limit in any way either the Commission's supervisory power over delegated staff actions or the Commission's power to consult with the staff on a formal or informal basis regarding institution of proceedings under this section.

(2) No petition or other request for Commission review of a Director's decision under this section will be entertained by the Commission.

RESPONDENT'S

BRIEF

In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-703

FLORIDA POWER & LIGHT COMPANY,
Petitioner,

v.

JOETTE LORION, d/b/a
CENTER FOR NUCLEAR RESPONSIBILITY,
Respondent,

UNITED STATES NUCLEAR REGULATORY COMMISSION
and the UNITED STATES OF AMERICA,
Respondents.

and No. 83-1031

UNITED STATES NUCLEAR REGULATORY COMMISSION
AND THE UNITED STATES OF AMERICA, PETITIONERS

v.

JOETTE LORION, ET AL.

ON PETITIONS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY

MARTIN H. HODDER
1131 N.E. 86th Street
Miami, Florida 33138
(305) 751-8706

Attorney for Respondent

QUESTION PRESENTED

Whether the court of appeals had jurisdiction, under 28 U.S.C. (Supp. V) 2342(4) and 42 U.S.C. 2239(b), to review a Nuclear Regulatory Commission order denying respondent's request that it suspend a nuclear power plant's operating license.

In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-703

FLORIDA POWER & LIGHT COMPANY,
Petitioner,

v.

JOETTE LORION, d/b/a
CENTER FOR NUCLEAR RESPONSIBILITY,
Respondent,

UNITED STATES NUCLEAR REGULATORY COMMISSION
and the UNITED STATES OF AMERICA,
Respondents.

and No. 83-1031

UNITED STATES NUCLEAR REGULATORY COMMISSION
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ON PETITIONS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY

RESPONDENT'S REPLY

Upon careful and deliberate consideration of the issue, Respondent, Joette Lorion et al., has determined that she will not submit argument in opposition to the captioned petitions for writs of certiorari which address a decision of the United States Court of Appeals for the District of Columbia Circuit reported at 712 F. 2d 1472 (DC Cir. 1983).

While Joette Lorion supports the decision of the Court of Appeals, she concedes that the decision in this case conflicts with decisions in the Second and Seventh Circuits (See Government Pet. at page 7; also FPL Pet. at page 7). Respondent also concedes that these conflicts pose issues of sufficient importance that they will ultimately require resolution by the Supreme Court of the United States.

Whether the Court should accept this case or defer review until the District Court in this case (or in other cases) has been permitted to develop a full record, is a matter we would leave to the Court's prudential discretion.

Should the Court determine the issues are presently ripe and warrant review, we will, of course, appear and file substantive briefs in support of the Court of Appeals decision.

Respectfully submitted,

Martin H. Hodder
1131 N.E. 86 Street
Miami, Florida 33138
Tel. 3-5-751-8706
Attorney for Joette Lorion,
et al.

No. 83-703, No. 83-1031

In the Supreme Court of the United States

OCTOBER TERM, 1983

FLORIDA POWER & LIGHT COMPANY, PETITIONER

v.

JOETTE LORION, ET AL., RESPONDENTS

UNITED STATES NUCLEAR REGULATORY COMMISSION and THE UNITED STATES OF AMERICA, PETITIONERS

v.

JOETTE LORION, ET AL., RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

JOINT APPENDIX

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Counsel for Respondent Joette Lorion

PETITIONS FOR WRITS OF CERTIORARI FILED OCTOBER 28, 1983 AND DECEMBER 21, 1983
CERTIORARI GRANTED MARCH 26, 1984

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 82-1132

JOETTE LORION, d/b/a
CENTER FOR NUCLEAR RESPONSIBILITY, PETITIONER

v.

UNITED STATES NUCLEAR REGULATORY COMMISSION
and UNITED STATES OF AMERICA, RESPONDENTS

FLORIDA POWER & LIGHT COMPANY, INTERVENOR

RELEVANT DOCKET ENTRIES

DATE	FILINGS—PROCEEDINGS
02-08-82	4-Petitioner's petition for review of an order of the Nuclear Regulatory Commission
02-08-82	Certified copy of petition for review was mailed to NRC & Attorney General
02-12-82	4-Motion of Florida Power & Light Company for leave to intervene
03-15-82	Clerk's order that the motion of Florida Power & Light Company for leave to intervene is granted
03-17-82	Certified Index to Record
03-18-82	4-Petitioner's motion to extend time to file brief for 30 days
03-24-82	4-Intervenor's response in opposition to petitioner's motion for extension of time
03-29-82	Clerk's order that the time for filing petitioner's brief is extended for a period of thirty (30) days from the date of this order, without prejudice

DATE	FILINGS—PROCEEDINGS
04-05-82	4-Petitioner's motion for deferred filing of appendix
04-08-82	4-Intervenor's motion to dismiss petition for review
04-09-82	4-Respondents' statement in support of motion to dismiss petition for review
04-15-82	Clerk's order that counsel for the parties are granted leave to proceed herein under the provisions of Rule 30(c), FRAP. In lieu of submitting one copy of the typewritten or page proof brief provided under Rule 30(c), counsel shall submit four (4) copies thereof for filing
04-19-82	4-Petitioner's response in opposition to intervenor's motion to dismiss
04-28-82	4-Petitioner's motion to extend time to file brief
05-05-82	Clerk's order that petitioner's motion for extension of time to file brief is granted and the time for filing petitioner's brief is extended to and including May 10, 1982
05-11-82	Petitioner's brief
05-18-82	Per Curiam order that the Clerk is directed to enter the case as dismissed unless, within 15 days of the date of this order, an amended petition for review is submitted to the Court, the caption of which indicates the party petitioning the Court is the same party that requested relief from the Commission; Tamm, Wilkey and Mikva (who did not participate)
06-01-82	4-Petitioner's amended petition for review of an order of the NRC
06-08-82	Certified copy of petitioner's amended petition for review was mailed to NRC and the Honorable Attorney General
06-15-82	15-Respondents' brief
06-29-82	15-Intervenor's brief
07-20-82	15-Petitioner's reply brief

DATE	FILINGS—PROCEEDINGS
07-21-82	7-Joint appendix
08-03-82	25-Intervenor's (Florida Power & Light Co.) brief
08-05-82	15-Respondents' brief
10-25-82	4-Respondents' suggestion to dispense with oral argument
10-26-82	4-Intervenor's (Florida Power & Light Co.) concurrence in respondents' suggestion to dispense with oral argument
11-01-82	4-Petitioner's opposition to respondents' suggestion to dispense with oral argument
11-08-82	Clerk's order that the suggestion to dispense with argument is denied; and sua sponte, that the following times are allotted for the oral argument of the above entitled case: Petitioner—15 minutes; Respondents—15 minutes. Only one counsel per side will be allowed to argue
11-18-82	ARGUED before MacKinnon * and Mikva, CJ's; and Luther M. Swygert, Senior Circuit Judge for the USCA for the Seventh Circuit
07-26-83	Opinion for the Court filed by Circuit Judge Mikva. See order 3-28-84
07-26-83	Per Curiam order by this Court that the instant petition for review is dismissed, and this case is transferred to the United States District Court for the District of Columbia, in accordance with the opinion of this Court filed herein this date. It is further ordered by this Court sua sponte that the Clerk shall withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. See Local Rule 14, as amended on November 30, 1981 and June 15, 1982. The parties are free, of course, to move for the earlier issuance of the mandate herein if they be so advised.

DATE	FILINGS—PROCEEDINGS
09-09-83	15-Respondents' petition for rehearing and suggestion for rehearing en banc
09-22-83	Per curiam order that respondent's petition for rehearing filed 09/09/83 is denied; Mikva, CJ, SCJ MacKinnon and SCJ Swygert for the 7th Circuit
09-22-83	Per curiam order, en banc, that the suggestion for rehearing en banc of respondents is denied; CJ Robinson, Wright, Tamm, Wilkey, Wald, Mikva, Edwards, Ginsburg, Bork and Scalia, SCJ MacKinnon and SCJ Swygert for the 7th Circuit
09-27-83	4-Respondents' motion to stay issuance of mandate
09-27-83	4-Intervenor's motion for stay of mandate
10-13-83	Per curiam order that the motion of respondents and intervenor to stay issuance of mandate are granted and the Clerk is directed to withhold issuance of the mandate of this Court to and including 10/31/83; Mikva, CJ, SCJ MacKinnon and SCJ Swygert for the 7th Circuit
10-26-83	4-Respondents' motion to extend stay of mandate
11-07-83	4-Petitioner's opposition to respondents motion to extend stay of mandate
11-08-83	Certified copy of notice from Clerk, Supreme Court that petition for writ of certiorari was filed 10-28-83 in SC No. 83-703
11-09-83	Notice from Clerk, Supreme Court that petition for writ of certiorari was filed 10-28-83 in SC No. 83-703
11-25-73	Per Curiam order that respondent's motion to extend stay of mandate is dismissed as moot: Mikva, CJ; SCJ MacKinnon; and Swygert, SCJ, USCA for the Seventh Circuit
01-03-84	Notice from Clerk, Supreme Court that petition for writ of certiorari was filed 12-21-83 in SC No. 83-1031

DATE	FILINGS—PROCEEDINGS
03-28-84	Per curiam order, sua sponte, that the Opinion and Order entered July 26, 1983 be, and the same hereby are, vacated; Mikva, CJ, SCJ MacKinnon and SCJ Swygert for the Seventh Circuit. See order 3-29-84
03-28-84	Certified copy of order from Clerk, Supreme Court granting petition for writ of certiorari on 03-26-84 in SC No. 83-703
03-28-84	Certified copy of order from Clerk, Supreme Court granting petition for writ of certiorari on 03-26-84 in No. 83-1031
03-29-84	Per curiam order, sua sponte, that the order of March 28, 1984, having been inadvertently entered, is hereby vacated; Mikva, CJ, SCJ MacKinnon and SCJ Swygert for the 7th Circuit

[LOGO]

CNR

CENTER FOR NUCLEAR RESPONSIBILITY
7210 Red Road, Room 208
South Miami, FL 33143
305-661-2165

U.S. Nuclear Regulatory Commission
1717 H Street, N.W. 11th Floor
Washington, D.C. 20555

Nunzio J. Palladino, Chairman
Victor Gilinsky, Commissioner
Peter A. Bradford, Commissioner
John F. Ahearne, Commissioner

September 11, 1981

Gentlemen:

I write to you out of concern about Turkey Point nuclear unit #4, and what appears to be the NRC's lack of concern as to the increasingly severe safety problems plaguing this unit. Areas of immediate concern to myself and other Miami residents living near this reactor unit are:

1. Turkey Point Unit #4 is one of eight nuclear reactor units that the NRC has named whose steel pressure vessel may be vulnerable to cracking or shattering caused by thermal shock in the event of an accident that requires high pressure injection emergency cooling.

2. Turkey Point Unit #4 is operating in an impaired condition with nearly 25% of its steam generator tubes plugged and removed from service. This reduction in heat transfer area could cause this unit to be more susceptible to overheating, necessitating emergency cooling.

3. Turkey Point Unit #4 is required to be shut down every six months for steam generator inspection and tube plugging in order to maintain safe operation of the unit. The last inspection was scheduled for July of 1981 but the NRC granted FP&L an extension on its operating license allowing Unit #4 to run for two additional months. This is despite the fact that the NRC has stated in various documents that "we do not have an adequate technical basis to predict steam generator performance for periods longer than six months."

4. Turkey Point Unit #4 is operating presently with steam generator tubes that may be on the verge of leaking. The Union of Concerned Scientists in a 1975 study on Nuclear Power Risks claims that if only a handful of tubes ruptured in an accident, the emergency core cooling system would be stalled and the core could melt. Should such an accident occur and the reactor vessel did not maintain its integrity, there would be no way to protect the public health and safety of the residents of Miami.

5. Both steam generator tube integrity and pressure vessel integrity are unresolved safety issues before the NRC.

In light of these safety problems at Turkey Point Unit #4, we ask that the Nuclear Regulatory Commission take steps to immediately initiate a license review of this nuclear reactor unit. It is the responsibility of the Nuclear Regulatory Commission to protect the public health and safety, and this can only be accomplished if adequate safety systems exist to protect the public in case of an accident.

Turkey Point Unit #4 will continue to deteriorate, and is quickly approaching the magic number of 25% of its tubes plugged. We hope at this point the NRC will derate the unit, so that it doesn't operate in an unsafe manner.

In closing, we ask that the NRC request that Turkey Point Unit #4 shut down immediately for its already delayed steam generator inspection. We also ask that the NRC consider the suspension of the license for Turkey Point Unit #4 until such time as FP&L submits proof that this reactor unit's pressure vessel would maintain its integrity in a loss of cooling accident.

As the consequences of a core melt would be totally unacceptable to the residents of Miami, we respectfully ask that prompt action be taken on these crucial matters.

Respectfully yours,

/s/ Joette Lorion
JOETTE LORION

Center for
Nuclear Responsibility

cc Marshall Grautenhuis, NRC
Atomic Safety and Licensing Board
Joe Gilliland, NRC Atlanta
Attorney Martin Hodder
Robert Pollard, UCS
Dr. Gordon Edwards, CCNR

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 82-1132

JOETTE LORION, PETITIONER

v.

UNITED STATES NUCLEAR REGULATORY COMMISSION
and UNITED STATES OF AMERICA, RESPONDENTS

CERTIFIED INDEX OF THE RECORD

The Nuclear Regulatory Commission hereby certifies that the material listed and described below constitutes the administrative record underlying the Commission decision which is the subject of the instant petition for review.

For the Commission,

/s/ Samuel J. Chilk
SAMUEL J. CHILK
Secretary of the Commission

Dated at Washington, D.C.
This 15th day of March, 1982

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

FLORIDA POWER AND LIGHT COMPANY
(Turkey Point Unit 4)

Docket No. 50-251
(2.206)

INDEX

Date Docketed Office of the Secretary	Date of Document	Document Number	Title or Description of Document
Mar 16, 1982	Jun 23, 1981	17	Letter Varga to Florida Power and Light Company enclosing Amendment 68 to Operating License No. DPR-31 and Amendment 60 to Operating License No. DPR-41
Mar 16, 1982	Jul 6, 1981	18	Letter Varga to Florida Power and Light Company enclosing Amendment 62 to Operating License
Mar 16, 1982	Jul 30, 1981	19	Letter Florida Power and Light Company to Eisenhut requesting that Unit 4 be authorized to operate for an additional two equivalent full power months prior to performing the next steam generator inspection with enclosures
Mar 16, 1982	Aug 21, 1981	20	Letter Eisenhut to Florida Power and Light Company regarding pressurized thermal shock to reactor pressure vessels
Mar 16, 1982	Sep 10, 1981	21	Letter Marshall Grotenhuis to Florida Power and Light Company enclosing Amendment 66 to Operating License for Unit 4

SUPREME COURT OF THE UNITED STATES

No. 83-703

FLORIDA POWER & LIGHT COMPANY, PETITIONER

v.

JOETTE LORION, ETC., ET AL.

ORDER ALLOWING CERTIORARI

Filed March 26, 1984

The petition herein for a writ of certiorari to the *United States Court of Appeals for the District of Columbia Circuit* is granted. This case is consolidated with case No. 83-1031, *United States Nuclear Regulatory Commission and United States* v. *Joette Lorion, et al.*, and a total of one hour is allotted for oral argument.

SUPREME COURT OF THE UNITED STATES

No. 83-1031

UNITED STATES NUCLEAR REGULATORY COMMISSION and UNITED STATES, PETITIONERS

v.

JOETTE LORION, ET AL.

ORDER ALLOWING CERTIORARI

Filed March 26, 1984

The petition herein for a writ of certiorari to the *United States Court of Appeals for the District of Columbia Circuit* is granted. This case is consolidated with case No. 83-703, *Florida Power & Light Company* v. *Joette Lorion, etc., et al.*, and a total of one hour is allotted for oral argument.

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Nos. 83-703 and 83-1031

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

FLORIDA POWER & LIGHT COMPANY,
Petitioner,
v.
JOETTE LORION, *et al.*,
Respondents.

UNITED STATES NUCLEAR REGULATORY COMMISSION
and THE UNITED STATES OF AMERICA,
Petitioners,
v.
JOETTE LORION, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR PETITIONER FLORIDA POWER & LIGHT COMPANY

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QUESTION PRESENTED

Whether the United States Courts of Appeals have subject matter jurisdiction, under provisions of the Atomic Energy Act, 42 U.S.C. § 2239, and the Administrative Orders Review Act, 28 U.S.C. § 2342, to review a final order of the Nuclear Regulatory Commission denying a request that it suspend the operating license of a nuclear power plant.

PARTIES TO THE PROCEEDING

Joette Lorion, doing business as the Center for Nuclear Responsibility, was the petitioner in the proceeding in the United States Court of Appeals for the District of Columbia Circuit.

The United States Nuclear Regulatory Commission and the United States of America were respondents in the Court of Appeals proceeding. Florida Power & Light Company intervened in the proceeding below in support of respondents. Florida Power & Light Company is the parent company of Land Resources Investment Company, Fuel Supply Service, Incorporated, and W. Flagler Investment Corp.

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BRIEF FOR PETITIONER FLORIDA POWER & LIGHT COMPANY

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia is reported at 712 F.2d 1472 (D.C. Cir. 1983) and is reproduced in the appendix to the petition in No. 83-703. That opinion was issued on

review of a decision of the Director of the Office of Nuclear Reactor Regulation which is reported at 14 N.R.C. 1078 (1981) and is also reproduced in the appendix to the petition in No. 83-703.[1]

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit is dated July 26, 1983 and is reproduced in the appendix to the petition in No. 83-1031.[2] The Government's Petition for Rehearing and Suggestion for Rehearing *en banc* were denied on September 22, 1983 (Govt. App. 3a-5a). On October 13, 1983, the Court of Appeals stayed issuance of its mandate pending application for a writ of certiorari. A petition for a writ of certiorari was filed by Florida Power & Light Company ("FPL") on October 28, 1983 (No. 83-703) and by the United States Nuclear Regulatory Commission and the United States of America on December 21, 1983 (No. 83-1031). The petitions were granted and the cases consolidated by order of this Court entered on March 26, 1984. The jurisdiction of the Court rests upon 28 U.S.C. § 1254(1).

RELEVANT STATUTES AND REGULATIONS

This case involves consideration of section 189 of the Atomic Energy Act, as amended (42 U.S.C. § 2239), and the Administrative Orders Review Act, 28 U.S.C. §§ 2342 and 2347, and 10 CFR §§ 2.202 and 2.206. These statutes and regulations are reproduced in the Appendix to this brief.

STATEMENT OF THE CASE

This case presents a single issue for the Court's resolution: whether the courts of appeals have jurisdiction to review orders of the Nuclear Regulatory Commission

[1] Cited hereinafter as "Pet. App. ——."

[2] Cited hereinafter as "Govt. App. ——."

which deny requests for the suspension of nuclear power plants' operating licenses. The issue turns on construction of the statutes referred to above. 28 U.S.C. § 2342 (4) confers upon the courts of appeals exclusive jurisdiction to review "all final orders of the [Nuclear Regulatory] Commission made reviewable by section 2239 of Title 42." The latter provision, which is section 189 of the Atomic Energy Act, relates to hearings, section 189 (a), and judicial review, section 189(b). Paragraph (1) of 42 U.S.C. § 2239(a) provides that:

> In any proceeding under this chapter, for the granting, suspending, revoking, or amending of any license or construction permit, or application to transfer control, and in any proceeding for the issuance or modification of rules and regulations dealing with the activities of licensees, and in any proceeding for the payment of compensation, an award or royalties under sections 2183, 2187, 2236 (c) or 2238 of this title, the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to such proceeding.

42 U.S.C. § 2239(b) specifies that "[a]ny final order entered in any proceeding of the kind specified in subsection (a) of this section shall be subject to judicial review in the manner prescribed in" 28 U.S.C. § 2342(4). The lower court's application of these provisions is described below.

1. The NRC Proceeding

On September 11, 1981, Joette Lorion, on the letterhead of the Center for Nuclear Responsibility, wrote to the Nuclear Regulatory Commission requesting that Turkey Point Nuclear Power Plant, Unit No. 4, owned and operated by FPL, be shut down immediately in order to inspect the plant's steam generator tubes for possible leaks. Ms. Lorion also made a number of allegations

concerning the safety of the unit's steam generators and asked that consideration be given to suspension of the unit's operating license because of her concerns over the safety of the reactor pressure vessel. (Joint Appendix, p. 6; Pet. App. 16-17). This letter was referred to the Director of Nuclear Reactor Regulation in accordance with an NRC regulation (10 CFR § 2.206) which was adopted "to provide a procedure for the submittal of such requests" to the Director. 39 Fed. Reg. 12,353 (April 5, 1974).

The procedure requires the Director to entertain the request of any person, regardless of interest, to initiate an enforcement proceeding, *i.e.*, "to institute a [show cause] proceeding pursuant to § 2.202[3] to modify, suspend or revoke a license, or for such other action as may be proper." 10 CFR § 2.206(a). In response to such a request, the Director must "either institute the requested proceeding in accordance with this subpart or . . . advise the person who made the request in writing that no proceeding will be instituted in whole or in part, with respect to his request, and the reasons therefor." 10 CFR § 2.206 (b). If the Director does issue a show cause order, section 189(a) and the Commission's implementing regulations offer an opportunity for a full adjudicatory hearing to the licensee or other person whose interest may be affected by the proceeding. 10 CFR § 2.202; 10 CFR Part 2, Subpart G.

However, section 2.206 has been interpreted to require that a show cause order be issued pursuant to 10 CFR § 2.202 only if the Director finds that a "substantial health or safety issue had been raised" by the request. *In re Consolidated Edison Co.* (Indian Point, Units 1, 2, & 3), 2 N.R.C. 173, 176 (1975). In making this de-

[3] 10 CFR § 2.202 authorizes designated NRC officials, including the Director, to institute administrative show cause proceedings to modify, suspend, or revoke a license.

termination, the Director "is free to rely on a variety of sources of information, including staff analyses of generic issues, documents issued by other agencies, and the comments of the licensee on the factual allegations." *In re Northern Indiana Public Service Co.* (Bailly Generating Station, Nuclear-1), 7 N.R.C. 429, 433 (1978), *aff'd sub nom. Lake Michigan Federation v. NRC*, 606 F.2d 1364 (D.C. Cir. 1979).

In accordance with this procedure, the Director in this case thoroughly considered Ms. Lorion's claims regarding steam generator tube leakage, steam generator safety, and integrity of the reactor pressure vessel, during the course of which he developed a 547-page record.[4] The Director's decision concluded that the issue of shutting down the unit to permit inspection of the steam generator tubes was moot since the unit had been shut down and an inspection commenced subsequent to the receipt of Ms. Lorion's letter. (Pet. App. 19). The Director's decision also addressed Ms. Lorion's allegations concerning steam generator safety, described the monitoring program which had been undertaken by FPL and the limitations on operation which had been imposed by the NRC (Pet. App. 19-20) and concluded that "[t]he procedures and safeguards instituted in relation to that problem are sufficient to safeguard the public health and safety." (Pet. App. 22; footnote omitted). With respect to Ms. Lorion's concerns relating to pressure vessel integrity, or thermal shock, the decision concluded that "reactor vessel failure from such an event in the near term is unlikely. Therefore, no immediate licensing action is required for operating reactors including Unit 4." (Pet. App. 23; footnote

[4] The record includes, *inter alia*, utility operating licenses, license amendments, NRC staff evaluations, NRC Regulatory Guides, and Safety Evaluations by the Office of Nuclear Reactor Regulation.

omitted). It also described the action that was being "taken to resolve the long-term problem." *Id.*

Accordingly, the decision denied Ms. Lorion's request. (Pet. App. 16). Ms. Lorion thereafter requested the Commission to rescind or set aside the decision. However, the Commission neither took such action (Pet. App. 3) nor did it exercise its discretionary authority under section 2.206(c)(2) to review the Director's decision, which consequently became the final action of the agency.

2. The Court of Appeals' Decision

Ms. Lorion petitioned for review of the Director's decision in the Court of Appeals for the District of Columbia Circuit pursuant to 28 U.S.C. § 2342(4) and 42 U.S.C. § 2239(b). Among other arguments, the petition asserted that the NRC's section 2.206 procedures are arbitrary and capricious and fail to meet statutory requirements. She argued that she was entitled to a public hearing and, alternatively, that her letter was not intended as a petition pursuant to section 2.206. She also argued that the NRC had violated NEPA[5] in connection with the licensing of repairs to the Turkey Point steam generators. (Pet. App. 3). FPL intervened in support of the Federal respondents and of the validity of the NRC's action.

In the decision below the Court of Appeals noted that, because the NEPA contentions had not been raised in Ms. Lorion's September 1981 letter, they had not been "subjected to agency scrutiny during the administrative process." (Pet. App. 4). It therefore held that the NEPA arguments were not "properly before us." *Id.* It also expressly rejected Ms. Lorion's argument that the letter should not have been treated "as a section 2.206 request"

[5] National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321, *et seq.*

and approved the Commission's policy "to treat 'any' request for the modification, suspension, or revocation of a license . . . " under that provision. *Id.* Therefore, it viewed the petition for review as asking "us to consider the Commission's treatment of the petitioner's September 1981 letter under 10 C.F.R. § 2.206." *Id.* With respect to that request, the court below held that it lacked subject matter jurisdiction to review a Director's decision not to institute show cause proceedings pursuant to 10 CFR § 2.202.[6] (Pet. App. 13-14). And, on the presumption that such jurisdiction is possessed by the district courts, the Court of Appeals dismissed the case and ordered it transferred to the United States District Court for the District of Columbia pursuant to 28 U.S.C. § 1631 (Pet. App. 14-15).

The court below held that section 189(b) and 28 U.S.C. § 2342(4) only confer upon the courts of appeals authority to review final orders of the NRC entered after a "formal proceeding."[7] The court concluded that a decision not to institute a proceeding pursuant to 10 CFR § 2.202 to modify, revoke or suspend a license does not constitute such a "formal proceeding." (Pet. App. 2, 6, 13-14).

The court of appeals recognizes that its conclusion is in conflict with its own prior decisions and the decisions of every other court that has considered the jurisdictional issue. However, the opinion states that the court below is "no longer comfortable" (Pet. App. 10) with what it perceived as inconsistent applications of the term "pro-

[6] The court below reached that conclusion notwithstanding the fact that, pursuant to a uniform line of prior authority (*infra*, pp. 12-14), all of the parties assumed that the courts of appeals possess such jurisdiction, and did not raise or brief the issue. In fact, the question was raised for the first time by the panel at oral argument.

[7] The court below apparently used the phrase "formal proceeding" to designate those proceedings "in which a person may, upon request, demand a hearing." (Pet. App. 5).

ceeding" in subsections (a) and (b) of section 189 of the Atomic Energy Act. The opinion states that:

> The conclusion of this court in *Porter County* that section 2.206 requests do not entail "proceedings" under 42 U.S.C. § 2239(a) for procedural purposes, 606 F.2d at 1369, and the Commission's reiteration in the present case that "[u]nless and until granted, a [request for enforcement] is not a 'proceeding' where the requestor has any right to present evidence," Government Brief at 24-25, precludes this court from viewing the section 2.206 process as a "necessary" part of the NRC's formal licensing proceedings for jurisdictional purposes.

(Pet. App. 12; brackets in original). Because "Congress has explicitly referenced its use of the word 'proceeding' in the statute's jurisdictional section to the kinds of 'proceedings' specified in the statute's procedural section" (Pet. App. 11-12), and because of "the Commission's steadfast insistence that the section 2.206 process does not entail a 'proceeding' within the meaning of 42 U.S.C. § 2239(a) . . ." (Pet. App. 13), the court below declined to "import the well-founded presumption against bifurcation of judicial forums" or "to read notions of judicial economy into . . ." the instant statutory review scheme and concluded it lacked subject matter jurisdiction over the petition. (Pet. App. 12).

SUMMARY OF ARGUMENT

Section 189 of the Atomic Energy Act, as consistently interpreted in cases prior to this one, is a straightforward provision which specifies that jurisdiction for review of NRC licensing actions lies in the courts of appeals. Under this construction, the rejection by the Director of an enforcement request under 10 CFR § 2.206 is treated, for purposes of judicial review, no differently than a decision resulting after the issuance of a show cause order and a formal adjudication. In consequence of all previous decisions under section 189, the fact that the

NRC's decision is made at an earlier, rather than later, stage of a proceeding does not affect the jurisdiction granted to the courts of appeals under section 189(b) and the Administrative Orders Review Act, 28 U.S.C. § 2342(4).

The heretofore uniform conclusion of the circuits that have addressed the question now before this Court is consistent with the language of section 189. Contrary to the lower court's formalistic and inflexible reading of the statute, the terms "hearing" and "proceeding" are not coextensive and interchangeable. Instead, a Director's denial of a section 2.206 request may be construed, as earlier decisions have, as "a necessary first step" in a proceeding under section 189(a). Such an interpretation results in the treatment of the systematic processing of a section 2.206 request, culminating in a written denial explaining the Director's reasoning, as a "proceeding" and comports with the terms of section 189(a).

The conclusion of the court below, equating proceedings with formal adjudications, was therefore not required by the language of the statute. Nor was it required by the legislative history. Although that history does not directly address the question, it is fully consistent with the conclusion that Congress intended the courts of appeals to have jurisdiction over all NRC licensing decisions. Moreover, by avoiding the risks of inconsistent district court decisions and the delays involved in a two-tier system of review, court of appeals jurisdiction over all NRC licensing decisions effectuates the overall objective of the Atomic Energy Act to implement a uniform national policy for the development and regulation of nuclear energy.

The refusal of the court below to consider otherwise relevant policies also conflicts with the expressed views of this Court. In *Crown Simpson Pulp Co. v. Costle*, 445 U.S. 193 (1980), the Court indicated that a jurisdictional statute should be interpreted to effect desired practical results where it is consistent with legislative policy. A

growing number of courts and commentators have pointed out the benefits to be gained from interpreting jurisdictional grants in a way which promotes efficiency, accuracy, and uniformity. The decision below interposes the district court between the agency and the court of appeals and thereby creates an unnecessary, duplicative layer of judicial review intended to be eliminated by the Administrative Orders Review Act, raises the possibility that the proper forum for review of the same enforcement request may depend on whether the agency's response is positive or negative, tends to bifurcate judicial review of claims arising out of essentially the same facts and interferes with judicial uniformity and the development of centralized expertise.

Finally, the administrative record compiled in connection with a Director's denial of a section 2.206 request is, as in this case, ordinarily adequate to support review by the courts of appeals. In the infrequent cases in which the record may be inadequate, the courts of appeals may remand to the agency for supplementation of the record.

Accordingly, the decision below is not required by the language or history of the governing statutes, is inconsistent with the objectives of the Atomic Energy and Administrative Orders Review Acts and is in conflict with policy considerations relating to the appropriate forum for judicial review.

ARGUMENT

I. THE COURT OF APPEALS' INTERPRETATION OF SECTION 189 OF THE ATOMIC ENERGY ACT IS NOT WARRANTED BY THE LANGUAGE OF THE STATUTE

As pointed out above, NRC regulations (10 CFR §§ 2.202 and 2.206) implementing section 189 establish a scheme under which requests for enforcement action are considered and responded to with the degree of formality justified by the facts presented and the matters raised. If serious licensee violations or potentially hazardous conditions are likely, the Director may issue a show cause order and the licensee or other persons whose interest may be affected by the proceeding may request a hearing. If, on the other hand, the Director concludes that the claims made by the requesting party do not justify the issuance of such an order, the proceeding is terminated.

Neither logic nor the language of section 189 supports the holding of the court below that the forum for judicial review should differ depending on the stage at which the final decision is made.[8] The Court of Appeals' reading of the statute as one which "explicitly restricts our reviewing jurisdiction to those final orders entered in the kinds of formal 'proceedings' specified in 42 U.S.C. § 2239(a) . . ." (Pet. App. 11) and its view that "a section 2.206 request [merely] triggers a preliminary investigation by the NRC's staff to determine whether or not a formal proceeding should be instituted. . ." (Pet. App. 6) rest on the misconception that section 189(a) proceedings

[8] The decision below is clearly limited to "denials of section 2.206 requests." (Pet. App. 14). If such a request is granted, a license amendment proceeding is initiated and a hearing will be held at the request of the licensee or any other person whose interest may be affected by the proceeding. Under the rationale of the decision below, exclusive jurisdiction to review that proceeding is unquestionably in the courts of appeals.

must be "formal," *i.e.*, proceedings in which an opportunity for a hearing is afforded. The court's conclusion in this regard was based on precedent holding that hearings on section 2.206 enforcement requests were properly denied by the NRC. *Illinois v. NRC*, 591 F.2d 12 (7th Cir. 1979); *Porter County Chapter of the Izaak Walton League v. NRC*, 606 F.2d 1363 (D.C. Cir. 1979).

In both *Illinois* and *Porter County*, the courts rejected arguments that a requesting party is automatically entitled to a formal, evidentiary hearing, reasoning that "[t]he agency is not bound to launch full-blown proceedings simply because a violation of the statute is claimed. It may properly undertake preliminary inquiries in order to determine whether the claim is substantial enough under the statute to warrant full proceedings." *Porter County*, *supra*, 606 F.2d at 1369. Contrary to the view of the court below, this language does not imply that both subsections (a) and (b) of section 189 refer only to "formal" or "full blown" proceedings in which an opportunity for a hearing is extended. Indeed, the *Porter County* court affirmed the NRC's section 2.206 denial without questioning its jurisdiction to do so, logically declining to impose a requirement that a section 189(a) proceeding reach a level of formality not specified by the statute itself in order to be subject to judicial review in accordance with section 189(b).

The interpretation of section 189(a) adopted by the court below is in fact inconsistent with every other judicial ruling on the issue. The term "proceeding" in subsection (a) has been uniformly construed in a manner which includes the systematic process which the NRC has established under sections 2.202 and 2.206 of its rules for deciding any license suspension request—whether or not that process included an opportunity for a hearing. Thus, in *Natural Resources Defense Council, Inc. v. NRC*, 606 F.2d 1261 (D.C. Cir. 1979), the court agreed with the NRC's argument that appeals of denials of requests that

it assert its licensing authority were within the courts of appeals' exclusive jurisdiction. The petitioner's contrary contention relied on the fact that the NRC's decision refusing, for lack of statutory authority, to license certain tanks constructed for the storage of high level radioactive waste preceded, and rendered unnecessary, any licensing action. According to the D.C. Circuit,

> In the circumstances of this case, the absence of an application for a license is not dispositive. Since a licensing jurisdiction determination is a necessary first step in any proceeding for the granting of a license, we hold that NRC's decision was "entered in a proceeding" for "the granting . . . of any license."

Id. at 1265. The same court followed its earlier *NRDC* holding in *Seacoast Anti-Pollution League of New Hampshire v. NRC*, 690 F.2d 1025 (D.C. Cir. 1982), concluding, in a situation similar to Lorion's, that an NRC

> determination whether to institute a revocation proceeding was "a necessary first step" in any proceeding for the revocation of the Seabrook construction permits. Hence, we hold that the Commission's final order refusing [a section 2.206 request] to institute such a proceeding is reviewable by this court under 42 U.S.C. § 2239 (1976).

690 F.2d at 1028. Until the D.C. Circuit reversed its previous holdings in *NRC* and in *Seacoast*, the precedent on this subject was uniform.[9] Every court of appeals

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[9] *See* Rockford League of Women Voters v. NRC, 679 F.2d 1218 (7th Cir. 1982), upholding the NRC's denial of a Section 2.206 request to institute construction permit revocation proceedings on the basis of allegedly unresolved safety concerns; County of Rockland v. NRC, 709 F.2d 766 (2nd Cir. 1983), *cert. denied*, 104 S. Ct. 485 (1983) (NRC denial of 2.206 request reviewable in courts of appeals); Simmons v. Arkansas Power & Light Co., 655 F.2d 131 (8th Cir. 1981); Sunflower Coalition v. NRC, 534 F. Supp. 446 (D. Colo. 1982); Desrosiers v. NRC, 487 F. Supp. 71 (E.D. Tenn. 1980); Susquehanna Valley Alliance v. Three Mile Island, 485 F. Supp. 81 (M.D. Pa. 1979), *aff'd/rev'd in part*, 619 F.2d 231

dealing with the question either expressly decided or assumed that it is vested with jurisdiction to review the NRC's decision upon an enforcement request even if the request was denied without affording the requesting party an opportunity for a hearing.

In large part the conclusion of the court below that the separate lines of authority represented, on the one hand, by *Porter County* and, on the other, by *NRDC* are irreconcilable is based on a misunderstanding of the hearing requirement of section 189(a) and the level of formality which that provision requires. The opinion below repeatedly emphasizes that section 189(b) confers jurisdiction upon courts of appeals to review a final NRC licensing order only if such order results from a "formal" proceeding, *i.e.*, from a proceeding in which an interested person may request a hearing.[10] (*See, e.g.*, Pet. App. 2, 5, 13).

However, this Court has held that even though the governing statute provides that a permit for the discharge of pollutants be issued "after opportunity for public hearing," [11] the proceeding may be concluded without a hearing when the contentions advanced fail to meet "a threshold burden of tendering evidence suggesting the need for a hearing." *Costle v. Pacific Legal Foundation*, 445 U.S. 198, 214 (1980). In that case, the Court upheld the denial by the Environmental Protection Agency of a hear-

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(3rd Cir. 1980), *cert. denied sub nom.* General Public Utilities Corp. v. Susquehanna Valley Alliance, 449 U.S. 1096 (1981); Honicker v. Hendrie, 465 F. Supp. 414 (M.D. Tenn. 1979), *appeal dismissed*, 605 F.2d 556 (6th Cir. 1979), *cert. denied*, 444 U.S. 1072 (1980); Paskavitch v. NRC, 458 F. Supp. 216 (D. Conn. 1978).

[10] In view of the fact that the NRC regulations provide an opportunity for a full adjudicatory hearing, 10 CFR Part 2, Subpart G, that is apparently the type of hearing to which the court was referring.

[11] Section 402 of the Federal Water Pollution Control Act ("FWPCA"), 33 U.S.C. § 1342.

ing where the only hearing request submitted raised no material issue of fact. According to the Court, a holding below to the opposite effect was

> contrary to this Court's approval in past decisions of agency rules, similar to those at issue here [and which implement statutory hearing mandates], that have required an applicant who seeks a hearing to meet a threshold burden of tendering evidence suggesting the need for a hearing. See, *e.g.*, *Weinberger v. Hynson, Westcott & Dunning, Inc.*, 412 U.S. at 620-621, 93 S.Ct., at 2478-2479, and cases cited therein.

Id. at 214. Indeed, the D.C. Circuit has in the past applied the same principle to proceedings which it clearly recognized to fall within section 189(a) of the Atomic Energy Act. In *BPI v. AEC*, 502 F.2d 424 (D.C. Cir. 1974), that court upheld the Commission's denial of a hearing on an operating license application to an interested person because of the latter's failure to inform the Commission, as required by the regulations (10 CFR § 2.714(a)), of the contentions to be advanced in the requested hearing and the bases therefor. *See* also *Union of Concerned Scientists v. NRC*, No. 82 2053 (D.C. Cir. May 25, 1984), slip op. at 24.

Viewed in light of *Pacific Legal Foundation* and *BPI*, *Porter County* and *Illinois* do no more than authorize the NRC to conclude section 189(a) proceedings without convening pointless adjudicatory hearings. The lower court's contrary impression that "the Commission's processing of such [section 2.206] requests repeatedly has been held *not* to constitute a 'proceeding' under 42 U.S.C. § 2239(a)" (Pet. App. 7), citing *Illinois* and *Porter County*, owes more to possible imprecision in the language of those holdings and in the briefs below [12] than to

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[12] The language used in Illinois is not completely clear and can be read as meaning that a Director's denial, without having afforded an opportunity for a hearing, either is not part of a "proceeding"

the intended scope of the earlier cases. Thus, in *Porter County*, the D.C. Circuit Court prefaced its analysis by explaining that the challenged agency action related to "the procedure by which the Nuclear Regulatory Commission (NRC) passes on a request to institute an adjudicatory proceeding to suspend and revoke a permit to construct a nuclear power plant." 606 F.2d at 1365. The context of the decision was the NRC's refusal to "institute an adjudicatory proceeding" or to "launch full-blown proceedings simply because a violation of the statute is claimed." *Id.* at 1369. In reaching this conclusion, it described the Seventh Circuit's ruling in *Illinois* as "congruent" with its own. *Id.* at 1369 n.16.

The conclusion of the court below that, because the NRC may dispose of requests for enforcement action without "adjudicatory" or "full-blown" proceedings and without "hearings," the section 2.206 process is not a section 189(a) proceeding, is therefore not compelled by the *Porter County* and *Illinois* opinions. These cases can be read, more narrowly than did the Court of Appeals but entirely consistently with *NRDC* and its progeny, to permit the use of informal, summary procedures to conclude section 189(a) proceedings in appropriate situa-

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at all or merely is not part of a "formal proceeding." 591 F.2d at 14. And, in its Petition for Rehearing and Suggestion for Rehearing En Banc, the Government explained to the court below that:

> Past statements such as those in Porter County v. NRC, 606 F.2d 1363 (D.C. Cir. 1979), that section 2.206 requests do not require full proceedings under 42 U.S.C. § 2239(a), and in the Commission's brief that "[u]nless and until granted, a [request for enforcement] is not a 'proceeding' where the requester has any right to present evidence," were made in response to arguments that 2.206 requests mandated formal, adjudicatory hearings, and meant no more than that a 2.206 request does not automatically require an adjudicatory hearing. They did not mean that a 2.206 denial cannot be a step in a proceeding prior to any hearing, or cannot itself be an informal proceeding.

Petition for Rehearing, at 3 n.2.

tions. The court below thus erred in equating proceedings under section 189(a) with "formal" proceedings, *i.e.*, with proceedings in which interested persons may request a hearing.

Contrary to the decision of the Court of Appeals, therefore, the interpretation it rejected "does not allow 'proceeding' to mean one thing for procedural purposes and another for jurisdictional purposes." (Pet. App. 11). Rather, the position that section 189 can reasonably be construed as granting courts of appeals jurisdiction to review denials of section 2.206 enforcement requests as the first step in a proceeding in which a hearing is neither justified nor mandated is wholly consistent with the terms of the statute. The Court of Appeals' constriction of its review jurisdiction was consequently not warranted.

II. THE COURT OF APPEALS' DECISION DEFEATS THE PURPOSE OF SECTION 189 OF THE ATOMIC ENERGY ACT

As the court below observed, the legislative history specifically addressed to the adoption of section 189 is "sparse." [13] (Pet. App. 13). In *NRC*, however, the same

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[13] The statutory history that does exist favors the view rejected by the Court of Appeals. Two versions of section 189 introduced in Congress were not enacted. The first provided for court of appeals review over NRC orders "granting, denying, suspending, revoking, modifying or rescinding any license." H.R. 9757, 83d Cong., 2d Sess. § 189 (1954). The other provided for court of appeals review of suits to "enjoin, set aside, annul, or suspend any order of the Commission." H.R. 8862, 83d Cong., 2d Sess. § 189 (1954). The provision as passed permits review of "[a]ny final order entered in any proceeding" for "the granting, suspending, revoking, or amending of any license."

It can reasonably be inferred that Congress rejected the two proposed versions of section 189 in favor of language somewhere between them because Congress did not intend the courts of appeals to review NRC orders unrelated to licensing, such as proceedings for the imposition of penalties. *See* NRC v. Radiation Technology, Inc., 519 F. Supp. 1266, 1274-75 (D.N.J. 1981). Nor is there any

court was able to conclude that construing the provision to permit court of appeals review of NRC decisions denying requests to exert licensing authority "is fully consistent with this history." 606 F.2d at 1265 n.11. In deciding to reverse its earlier, uniformly followed, holding in *NRDC* because it found "no evidence . . . to suggest that Congress envisioned its jurisdictional grant in section 2239(b) to extend beyond orders entered in formal hearings . . ." (Pet. App. 13), the Court of Appeals in this case ignored recognized indicia of legislative intent and reached an unwise and impractical result.

A. The Court of Appeals' Decision Will Undermine Congress' Intent to Ensure Timely and Uniform Review of the NRC's Exercise of Licensing Authority

In a recent decision of the Tenth Circuit, the intent underlying the judicial review provisions of the Atomic Energy Act was clearly described.

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indication that Congress wanted court of appeals review limited to orders actually impacting licenses. Rather, it appears that Congress intended the courts of appeals to have jurisdiction to review all orders related to nuclear licensing. *Cf.* Sunflower Coalition v. NRC, 534 F. Supp. 446 (D. Colo. 1982) (courts of appeals have jurisdiction over NRC licensing decisions).

This inference is strengthened by the fact that Congress was aware that certain kinds of judicial proceedings arising out of the administration of the Atomic Energy Act should be heard in the district courts. Sections 232, 233 and 234 of the Act (42 U.S.C. §§ 2280, 2281 and 2282) expressly so provide with respect to injunction and contempt proceedings and proceedings for the imposition of civil monetary penalties. No similar provision is made with respect to any licensing matters. Further, Congress amended section 189 as recently as 1983, but did nothing to limit court of appeals jurisdiction over section 2.206 denials, implying concurrence in the holdings that such jurisdiction exists. *See* Blue Chip Stamps v. Manor Drug Store, 421 U.S. 723, 733 (1975); United States v. Republic Steel Corp., 491 F.2d 315 (6th Cir. 1974).

> The Atomic Energy Act represents an effort to implement a coherent plan for the development and regulation of nuclear energy. *See* 42 U.S.C. §§ 2012, 2013. An integral part of this plan is the speedy and final review of agency actions and regulations pursuant to the Atomic Energy Act. *See* H.R. Rep. No. 2122, 81st Cong., 2d Sess., *reprinted in* 1950 U.S. Code Cong. & Ad. News 4303, 4306 (court of appeals review was chosen as the "more modern method and . . . best method for review of orders of administrative agencies" because of its "simplicity and expedition.") The review mechanism chosen by Congress enables prompt implementation of national nuclear policy, by avoiding the delays of multiple litigation and the risk of inconsistent district court decision. *See Lubrizol Corp. v. Train*, 547 F.2d 310 (6th Cir. 1976).

Quivira Mining Co. v. EPA, 728 F.2d 477, 482 (10th Cir. 1984). In *Quivira* the court held that a transfer of functions from the Atomic Energy Commission to the EPA, resulting from legislation which was silent on procedures for judicial review, did not affect the circuit court's exclusive review jurisdiction "[u]ntil Congress clearly indicates its intent to alter the coherent energy plan inherent in the Atomic Energy Act." *Id.*

The Tenth Circuit's approach, which sought to interpret a jurisdictional grant whose legislative history offered no aid in a manner consistent with the purpose of the statutory scheme, is similar to the practice followed by this Court and counselled by commentators. Thus, in *Crown Simpson Pulp Co. v. Costle*, 445 U.S. 193 (1980), the Court considered the likely intent of the section of the Federal Water Pollution Control Act providing for court of appeals' review of EPA actions "in issuing or denying any permit . . . ." California administers its own program of permit issuance, and the EPA vetoed a permit proposed by the state authority. The Court reversed a court of appeals decision that the agency action

did not amount to "issuing or denying" a permit, holding that the effect of a veto was tantamount to a denial. In reaching its decision, this Court expressed its preference for construing the statute broadly to effectuate the presumed legislative design. "Under the contrary construction of the Court of Appeals, denials of . . . permits would be reviewable at different levels [and] would likely cause delays in resolving disputes . . . Absent a far clearer expression of congressional intent, we are unwilling to read the Act as creating such a seemingly irrational bifurcated system." 445 U.S. at 196-97. And in *Foti v. Immigration and Naturalization Service*, 375 U.S. 217 (1963), a unanimous Supreme Court declared a refusal to suspend an order of deportation to be directly reviewable in the courts of appeals as a "final order of deportation." Reversing the contrary decision of the Second Circuit, the Court rejected what it deemed the "[b]ifurcation of judicial review" which it characterized not only as "inconvenient" but "undesirable and not the necessary result [of] the statutory language." 375 U.S. at 236.

It seems clear that the Supreme Court's flexible approach in *Crown Simpson* and in *Foti* tends most often to promote the purpose of special review statutes. One commentator has opined that:

> Limited special review statutes create problems other than uncertainty. The purpose underlying such an enactment to consolidate review may be frustrated by limitations which divide between forums the group of reviewable actions, creating multiple channels of review and preventing the development of expertise and consistent policy in the reviewing courts. Admittedly, in some cases the purpose to consolidate may be limited to specific actions and the restriction on the scope of special review may have been deliberate and informed by sound policy. As Professor Jaffe has noted, however, in many cases there appears to be no purpose served by the limited

> language of a special review statute, and the language appears most likely to have resulted only from legislative oversight. In such cases, the basic purposes underlying the enactment of special review statutes may argue for a broad reading of the scope of the statutory procedure.
>
> These considerations suggest that limitations in the language of special review statutes should be carefully scrutinized to determine whether there is some basis for believing the legislative choice of language was deliberate and reflected some legislative policy. Where no such basis appears, and where the ambiguity of the limitation is sure to create uncertainty and potential hardship for litigants seeking review, a purposive interpretation would suggest searching for a broad construction of the language to consolidate review in the appellate court and to ensure that litigants will not be turned down there when seeking relief.

Note, *Jurisdiction to Review Federal Administrative Action: District Court or Court of Appeals*, 88 Harv. L. Rev. 980, 984-85 (1975).[14]

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[14] *See also* L. Jaffe, Judicial Control of Administrative Action (1965), at 158-159:

> [O]ne suspects that in most cases "bifurcation" will have been the consequence of an oversight. The result may be, at the least, untidy: a district court with little knowledge of an agency's work will be required to handle an odd case. In the absence of a conscious legislative choice, a court should ordinarily be able to skirt the shallows of literalism so as to avoid this bifurcation of channels.

Jaffe "would strive to the greatest extent possible to consolidate review in a single court. . . ." *Id.* at 422; Note, The Forum for Judicial Review of Administrative Action: Interpreting Special Review Statutes, 63 B.U.L. Rev. 765, 800 (1983): "Both Congress and the federal judiciary have recognized the Court of Appeals as the preferred forum for review of most administrative action . . . Accordingly, ambiguous special review statutes should be construed to allow Courts of Appeals to review all agency actions they are institutionally competent to hear."

The court below therefore erred in declining to consider the design of section 189 beyond dismissing the legislative history as "sparse" and inconclusive. Where the intent of Congress cannot be discerned directly, the court should—as the Tenth Circuit did in *Quivira Mining Co.*—interpret the statute in a manner most likely to effectuate its purpose, which, in the case of the Atomic Energy Act, is the promotion of efficiency and uniformity. As will be shown below, the decision of the court below has the opposite effect.

B. The Court of Appeals' Decision Unnecessarily Interferes With Efficient Judicial Review of NRC Licensing Actions

1. *The Decision Below Results in Duplicative Layers of Review, Thereby Conflicting With One of the Objectives of the Administrative Orders Review Act*

This Court has emphasized that one of "the most obvious advantage[s] of direct review by a court of appeals is the time saved compared to review by a district court, followed by a second review on appeal." *Harrison v. PPG Industries, Inc.*, 446 U.S. 578, 593 (1980). *See also Crown Simpson, supra*, 445 U.S. at 197. That expression of sound judicial policy is well recognized. Thus, the Administrative Conference of the United States has stated that "direct review by the courts of appeals, where feasible, is generally desirable in the interest of efficiency and economy, as respects both litigants and the judicial system." 1 CFR § 305.75-3(g) (1984).[15]

In the instant case these views are more than generalities. One of the objectives of the Administrative Orders

[15] It is a "difficult problem to justify mandatory two-tier review as against direct circuit court review. In every case eventually appealed to the circuit courts, interposition of the district court substantially increases the cost of litigation and delays the resolution of the controversy." Currie and Goodman, Judicial Review of Federal Administrative Action: Quest For The Optimum Forum, 75 Colum. L. Rev. 1, 16 (1975); *see also* Note, 63 B.U.L. Rev. at 793.

Review Act, which is here being applied, was to effectuate the economies and efficiencies of one-tier review. Its draftsmen stated that submission to courts of appeals of "records made before the administrative agencies will avoid the making of two records, one before the agency and one before the court, and thus going over the same ground twice." H.R. Rep. No. 2618, 81st Cong., 2d Sess. 4, reprinted in 1950 U.S. Code Cong. & Ad. News 4303, 4306.[16] Until the decision below, the courts gave effect to that objective in review of NRC denials of section 2.206 enforcement requests. In *NRDC*, the court was influenced by the duplicative layers of review that would result from successive district and circuit court review of the same agency action. 606 F.2d at 1265. It was noted in *Rockford*, 679 F.2d at 1221, that:

> Whenever the district courts have jurisdiction to review agency action, it means that anybody aggrieved by that action is entitled to two successive reviews of it—first in the district court and then, on appeal, in the court of appeals. This in turn implies five tiers of potential judicial or quasi-judicial review of the petitioner's [section 2.206] request in this case: by the Director of Nuclear Reactor Regulation, by the full Commission, by the district court, by the court of appeals, and by the Supreme Court. This is too much.

As we have demonstrated, neither the language of section 189 nor the legislative history of the Atomic Energy Act justify a contrary result.

[16] Other similar statutes have also been construed broadly to prevent the waste of judicial resources that would occur "if parties could press their case upon the administrative agency, then obtain review on the agency record in the District Court, and then enjoy an appeal as of right to the Court of Appeals, which would perform precisely the same function." Amusement and Musical Operators Ass'n. v. Copyright Royalty Tribunal, 636 F.2d 531, 534 (D.C. Cir. 1980), *cert. denied*, 450 U.S. 912 (1981). *See also* Denberg v. United States, 696 F.2d 1193, 1197 (7th Cir. 1983), holding that "where it is unclear whether review jurisdiction is in the district court or the court of appeals the ambiguity is resolved in favor of the latter . . . as it should be. . . ."

2. *The Decision Below Results in Undesirable Fragmentation of Review*

In addition to creating excessive layers of review, the holding of the court below results in the anomaly of judicial review of agency action turning on whether the NRC's decision upon a section 2.206 enforcement request is positive or negative. That is because, even in the view of the court below, any agency action taken after initiation of a show cause proceeding under § 2.202 would be reviewable as an order entered in a "formal proceeding," *i.e.*, in a proceeding in which interested persons have been offered an opportunity for a hearing pursuant to section 189(a).

Moreover, where the section 2.206 request is presented as one of several related claims, review of essentially the same issues can be splintered. In *Environmental Defense Fund v. Hardin*, 428 F.2d 1093, 1099 (D.C. Cir. 1970), the court was influenced by these considerations to accept jurisdiction to review the Secretary of Agriculture's refusal to act on a request for suspension of registration of a chemical pending a cancellation proceeding. In response to the argument that the Court of Appeals lacked jurisdiction to review this informal, interlocutory order, but could review the final order in the cancellation proceeding, the D.C. Circuit criticized the suggested approach "for dividing between two courts the review of the various orders involved in a single administrative proceeding." In *Crown Simpson*, *supra*, this Court deemed "irrational" the "bifurcated system" proposed by the Ninth Circuit. In *Investment Company Institute v. Board of Governors of Federal Reserve System*, 551 F.2d 1270, 1276 (D.C. Cir. 1977), bifurcation was characterized as "undesirable."[17] And in his dissent from the

[17] Such bifurcation already appears to have occurred in the instant case. The court below applied well-recognized principles of exhaustion of administrative remedies to conclude that "none of the petitioner's NEPA arguments are properly before us." (Pet. App. 4). Although we agree with this conclusion, we are puzzled by the court's willingness to express a view on one of the issues presented for judicial review but not necessary for its decision while, at the same time, holding itself to be without power to consider other issues sought to be reviewed.

denial of the petition for certiorari in *General Public Utilities Corporation v. Susquehanna Valley Alliance*, 449 U.S. 1096, 1099-1100 (1981), Justice Rehnquist declared it

> anomalous to hold, as did the court below, that the Atomic Energy Act claims are reviewable exclusively in the court of appeals, while claims arising [out of the same factual setting] under NEPA, FWPCA, and the Constitution are reviewable originally in the District Court. The decision below means that the District Court, the Court of Appeals, and the Commission will all exercise concurrent jurisdiction over the same claims at the same time. Such a trifurcated review procedure is not only inefficient, duplicating judicial and administrative effort, but more importantly, it leads to premature interference with agency processes, contrary to the policy underlying direct review statutes.[18]

It is true that the court below recognized the existence of a "well-founded presumption against bifurcation of judicial forums." Nevertheless, according to the court, "it is one thing to read notions of judicial economy into statutory terms capable of assimilating them and quite another to read out Congress' jurisdictional terms in order to accommodate our own policy preferences." (Pet. App. 12). We submit, however, that the court's commendable wish to comply with legislative intent was misdirected. The traditional presumption against bifurca-

[18] *See also* Currie and Goodman, *supra*, 75 Colum. L. Rev. at 11: "Sending parties to the district court for interim relief or to enforce orders reviewable in the court of appeals splits what might be thought a single case between two forums, with varying risks of duplication, conflict, expense and delay."

tion and duplication of review proceeds as much from a perception of Congress' design as from judicial policy concerns. Consequently, reversal of the decision below would effectuate not "our own policy preferences" but those of Congress.

3. *The Decision Below Does Not Promote Uniformity or the Application of Judicial Expertise*

The Court of Appeals' inflexible approach to interpretation of section 189 ignored other policy considerations as well as ones discussed above. Perhaps the most important of these are uniformity and expertise. "[T]he great advantages of review in the courts of appeals: its capacity, or perceived capacity, for superior decisionmaking and its ability to develop and maintain a uniform and coherent case law for a large geographical area. . . ." are well recognized. Currie and Goodman, *supra*, 75 Colum. L. Rev. at 12. These characteristics are particularly important in the administration of a statute as highly complex and technical as the Atomic Energy Act, which sets national standards for radiological health and safety.[19] *Quivira Mining Co., supra.* Possible countervailing policy justifications sometimes offered to support district court review, including the need for convenient, accessible forums and for judges practiced in the art of trial procedures, are not persuasive here, since, as the discussion below indicates, review will be on the NRC record.

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[19] "[I]nconsistency may, in certain areas of administrative regulation, prevent the attainment of national policy. For example, consistent application of environmental legislation is necessary to achieve uniform national standards for air and water quality." Note, 63 B.U.L. Rev. at 793. This concern is equally apt with respect to nuclear energy.

C. The NRC Record Provides an Adequate Basis for Judicial Review

To the extent that the decision below may flow from doubts as to the adequacy of the agency record to support review in the court of appeals (Pet. App. 9), such doubts, it is submitted, are unjustified. In *Deutsche Lufthansa Aktiengesellschaft v. CAB*, 479 F.2d 912 (D.C. Cir. 1973), the D.C. Circuit asserted jurisdiction to review a regulation promulgated by the Civil Aeronautics Board in an informal proceeding. The relevant statute, 49 U.S.C. § 1486(a), conferred jurisdiction on the appellate courts to hear appeals from final agency "orders." Rejecting earlier decisions declining to interpret the provision broadly enough to include regulations promulgated without a prior evidentiary hearing,[20] the court declared that "[i]t is the availability of a record for review and not the holding of a quasi judicial hearing which is now the jurisdictional touchstone." *Id.* at 916.[21]

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[20] United Gas Pipe Line Co. v. FPC, 181 F.2d 796 (D.C. Cir. 1950), *cert. denied*, 340 U.S. 827 (1950). Although not expressly rejecting the reasoning advanced in United Gas, the Supreme Court, in United States v. Storer Broadcasting Co., 351 U.S. 192 (1956), held that the courts of appeals had jurisdiction, under a statute addressed to "orders", to review the FCC's issuance of an amendment to its multiple owner regulations after informal rulemaking proceedings. *See also* Frozen Food Express v. United States, 351 U.S. 40 (1956); Columbia Broadcasting System, Inc. v. United States, 316 U.S. 407 (1942).

[21] Later cases have followed the reasoning of Lufthansa. *See* Investment Company Institute v. Board of Governors of Federal Reserve System, 551 F.2d 1270, 1277-79 (D.C. Cir. 1977), holding that a challenge to a Federal Reserve Board regulation and interpretive ruling supported by a record of informal rulemaking qualified as an "order" for purposes of appellate review; Sima Products Corporation v. McLucas, 612 F.2d 309, 312-13 (7th Cir.), *cert. denied*, 446 U.S. 920 (1980), holding that:

> By adopting a liberal construction of "order," FAA actions which are the product of informal rulemaking, such as in this case, may be reviewed by courts of appeals, providing an adequate administrative record has been compiled by the agency

The record customarily compiled by the NRC in section 2.206 proceedings,[22] and the record actually compiled in the proceeding below, satisfies appellate review requirements. In *NRDC*, the D.C. Circuit Court supported its holding that a determination of licensing jurisdiction is a necessary first step in a licensing proceeding by noting the existence of a reviewable factual record including comments, correspondence and other submissions received from interested parties. According to the court, the "NRC assessed the issue before it and ruled [on the basis of the submittals] that statutory language and congressional intent precluded assertion of licensing jurisdiction over the tanks . . . As long as we have an administrative record on which to base our review, as we do here, there is no need for evidentiary hearings in the district court." 606 F.2d at 1265-66.

The procedure followed by the NRC in evaluating section 2.206 requests is quite similar to the EPA action considered by the Sixth Circuit in *Ford Motor Co. v. EPA*, 567 F.2d 661, 668 (6th Cir. 1977), in which case the court declared that "[t]he factual record . . . has been sufficiently developed" to permit court of appeals review. This record consisted of an automobile manufacturer's proposed modification to a discharge permit, correspondence between Ford, the EPA and state authorities regarding compliance with water quality standards, and EPA memorada analyzing the proposed permit in

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. . . [T]he purposes of special review statutes—coherence and economy—are best served if courts of appeals exercise their exclusive jurisdiction over final agency actions.

See also City of Rochester v. Bond, 603 F.2d 927, 932 (D.C. Cir. 1979), holding that the indicium of orders reviewable within the meaning of special review statutes is the adequacy of the administrative record.

[22] *See, e.g.*, In re Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), 7 N.R.C. 429, 433 (1978), *aff'd*, 606 F.2d 1364 (D.C. Cir. 1979); In re Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), 14 N.R.C. 1085 (1981).

light of national water policies. *See also Sima Products, supra*, where the court found that a record consisting of a notice of proposed informal rulemaking, written comments submitted in opposition thereto, and the promulgated regulation with its published explanation "is adequate for reviewing the [plaintiff's] claim." 612 F.2d at 314-15. In each of these cases, the record was made up entirely of written submissions and claims, agency documents readily accessible to members of the public or the industry, and written analyses and responses by the administrative body. The section 2.206 evaluation process normally includes these materials.[23]

Moreover, the Administrative Procedure Act, 5 U.S.C. § 706, specifies a deferential standard of review of informal agency actions such as denials of § 2.206 requests,[24] which may be set aside only if "arbitrary and capricious." 5 U.S.C. § 706(2)(A). The NRC record in this case clearly is adequate to support this level of review. The Director considered the matters raised by each of Lorion's allegations. In his response he explained that these issues had been evaluated by the NRC, described the nature of the agency's analyses, identified the documents relied on, and offered a reasoned explanation for denying the claims. This record permits the Court of Appeals to fulfill its statutory duty of determining

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[23] Court of appeals review of denials under section 2.206 is consistent with Recommendation No. 75-3(6) of the Administrative Conference of the United States. Such review of informal administrative action is recommended when the action "[t]ypically involve[s] issues of law of broad social or economic impact . . ." which "[t]ypically do not require an evidentiary trial at the judicial level . . ." and are either few in number or are "likely to reach the appellate courts . . . even if reviewed initially by district courts." 1 CFR § 305.75-3 (1984).

[24] *See* Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 414 (1971), limiting the substantial evidence standard stated in 5 U.S.C. § 706(2)(E) to formal agency action "taken pursuant to a rulemaking provision . . . or . . . based on a public adjudicatory hearing."

"whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971).

Finally, if there is concern that the record may be inadequate for circuit court review of a Director's denial in some particular proceeding, the courts of appeals may remand the proceeding to the agency to supplement the record. The efficiency of such a remand is well recognized. Thus, in *Harrison v. PPG Industries*, 446 U.S. at 593-94, this Court observed that allowing the court of appeals the option of remanding a case to the agency when the record is insufficient might be more efficient than requiring two layers of judicial review in every case. The Court has very recently reiterated its view of the efficacy of a remand to cure any deficiency in an administrative record. *FCC v. ITT World Communications*, 52 U.S.L.W. 4507, 4509 (May 1, 1984). In *Rockford*, the Seventh Circuit agreed to review NRC denials of section 2.206 requests despite concerns that the administrative record might be inadequate. According to the court, the overall "benefits to judicial economy" justified continued judicial review in the courts of appeals, since supplementation of the record, if required in a particular case, could be accomplished by remand to the agency. 679 F.2d at 1221.[25]

[25] *See also* Porter County, 606 F.2d at 1369-70; Note, 63 B.U.L. Rev. at 801; Note, 88 Harv. L. Rev. at 990. In addition, 28 U.S.C. § 2347(b) confers powers upon the courts of appeals to remand to the agency when it is determined that required agency hearings have not been held or to transfer proceedings to district courts if a genuine issue of material fact is presented. The transfer to a district court procedure made available by 28 U.S.C. § 2347(b)(3) is apparently rarely used. We have been able to discover only one case, an interlocutory injunction proceeding, in which this procedure has been utilized. Lake Carriers' Association v. United States, 414 F.2d 567 (6th Cir. 1969). We therefore assume that the remand procedure has been found to be adequate in those cases in which the agency record has been insufficient.

In this case, the 547-page record compiled by the Director is quite sufficient to permit a court of appeals to evaluate the NRC's response to Lorion's section 2.206 enforcement request. Moreover, the efficiency considerations discussed above favoring circuit court review compel the conclusion that remand to the agency for further fact finding in appropriate cases, should the need arise, is far more preferable than elimination of direct court of appeals review. We submit the court below erred in doing so.[26]

CONCLUSION

Leading cases discussed above and supporting court of appeals jurisdiction to review section 2.206 denials were issued by the same court whose contrary decision is now before this Court for consideration. Those cases, which had been uniformly followed, give effect to the obligation

[26] In transferring the case to the District Court for the District of Columbia pursuant to 28 U.S.C. § 1631, the Court of Appeals hypothesized that "district court review of the NRC's section 2.206 decisions" could be predicated on the general federal question or acts of commerce jurisdictional statutes, 28 U.S.C. §§ 1331 and 1337. (Pet. App. 14). Nevertheless, it is possible that the jurisdictional judgment to be made is not between district court and court of appeals review of NRC denials of requests to suspend operating licenses, but as between court of appeals review and no judicial review at all. The presumption that the agency's refusal to initiate show cause proceedings in response to Lorion's request is reviewable in the district court despite the absence of a statute so providing is subject to substantial question in view of the line of authority which holds that under the Administrative Procedure Act, 5 U.S.C. § 701(a)(2), the exercise of enforcement authority is "committed to agency discretion by law" and is therefore not subject to judicial review. *See* Action on Safety and Health v. FTC, 498 F.2d 757, 762-63 (D.C. Cir. 1974); NLRB v. Indiana & Michigan Electric Co., 318 U.S. 9 (1943); Kixmiller v. SEC, 492 F.2d 641 (D.C. Cir. 1974); Arizona Power Authority v. Morton, 549 F.2d 1231 (9th Cir.), *cert. denied*, 434 U.S. 835 (1977). However, the issue will not be presented if the courts of appeals' jurisdiction to review under 42 U.S.C. § 2239 and 28 U.S.C. § 2342 is reaffirmed by this Court.

of appellate courts to construe jurisdictional statutes consistently with the policies they serve. The rejection of the precedents by the court below is neither mandated by the terms of the statute nor consistent with legislative objectives. Moreover, the decision interferes with efficient administration of the regulatory scheme. The decision below should therefore be reversed.

Respectfully submitted,

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APPENDIX

STATUTES AND REGULATIONS

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28 U.S.C. § 2342(4) (1976)

§ 2342. Jurisdiction of court of appeals

The court of appeals has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of—

* * * *

(4) all final orders of the Atomic Energy Commission [1] made reviewable by section 2239 of title 42; and

* * * *

28 U.S.C. § 2347 (1976)

§ 2347. Petitions to review; proceedings

(a) Unless determined on a motion to dismiss, petitions to review orders reviewable under this chapter are heard in the court of appeals on the record of the pleadings, evidence adduced, and proceedings before the agency, when the agency has held a hearing whether or not required to do so by law.

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[1] The Energy Reorganization Act of 1974, Pub. L. 93-438, 88 Stat. 1233, 42 U.S.C. §§ 5801, *et seq.*, established the Nuclear Regulatory Commission and transferred the licensing and related regulatory functions of the Atomic Energy Commission to the Nuclear Regulatory Commission. Section 307(g) of the Energy Reorganization Act (42 U.S.C. § 5871(g)) provides in pertinent part:

> (g) Final orders and actions of any official or component in the performance of functions transferred by this Act shall be subject to judicial review to the same extent and in the same manner as if such orders or actions had been made or taken by the officer, department, agency, or instrumentality in the performance of such functions immediately preceding the effective date of the Act.

(b) When the agency has not held a hearing before taking the action of which review is sought by the petition, the court of appeals shall determine whether a hearing is required by law. After that determination, the court shall—

(1) remand the proceedings to the agency to hold a hearing, when a hearing is required by law;

(2) pass on the issues presented, when a hearing is not required by law and it appears from the pleadings and affidavits filed by the parties that no genuine issue of material fact is presented; or

(3) transfer the proceedings to a district court for the district in which the petitioner resides or has its principal office for a hearing and determination as if the proceedings were originally initiated in the district court, when a hearing is not required by law and a genuine issue of material fact is presented. The procedure in these cases in the district court is governed by the Federal Rules of Civil Procedure.

(c) If a party to a proceeding to review applies to the court of appeals in which the proceeding is pending for leave to adduce additional evidence and shows to the satisfaction of the court that—

(1) the additional evidence is material; and

(2) there were reasonable grounds for failure to adduce the evidence before the agency;

the court may order the additional evidence and any counter evidence the opposite party desires to offer to be taken by the agency. The agency may modify its findings of fact, or make new findings, by reason of the additional evidence so taken, and may modify or set aside its order, and shall file in the court the additional evidence, the modified findings or new findings, and the modfiied order or the order setting aside the original order.

42 U.S.C.A. § 2239 (1976 & West Supp. 1983)

§ 2239. Hearings and judicial review

(a) (1) In any proceeding under this chapter, for the granting, suspending, revoking, or amending of any license or construction permit, or application to transfer control, and in any proceeding for the issuance or modification of rules and regulations dealing with the activities of licensees, and in any proceeding for the payment of compensation, an award or royalties under sections 2183, 2187, 2236(c) or 2238 of this title, the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to such proceeding. The Commission shall hold a hearing after thirty days' notice and publication once in the Federal Register, on each application under section 2133 or 2134(b) of this title for a construction permit for a facility, and on any application under section 2134(c) of this title for a construction permit for a testing facility. In cases where such a construction permit has been issued following the holding of such a hearing, the Commission may, in the absence of a request therefor by any person whose interest may be affected, issue an operating license or an amendment to a construction permit or an amendment to an operating license without a hearing, but upon thirty days' notice and publication once in the Federal Register of its intent to do so. The Commission may dispense with such thirty days' notice and publication with respect to any application for an amendment to a construction permit or an amendment to an operating license upon a determination by the Commission that the amendment involves no significant hazards consideration.

(2) (A) The Commission may issue and make immediately effective any amendment to an operating license, upon a determination by the Commission that such amendment involves no significant hazards consideration, notwithstanding the pendency before the Commission of a request for a hearing from any

person. Such amendment may be issued and made immediately effective in advance of the holding and completion of any required hearing. In determining under this section whether such amendment involves no significant hazards consideration, the Commission shall consult with the State in which the facility involved is located. In all other respects such amendment shall meet the requirements of this chapter.

(B) The Commission shall periodically (but not less frequently than once every thirty days) publish notice of any amendments issued, or proposed to be issued, as provided in subparagraph (A). Each such notice shall include all amendments issued, or proposed to be issued, since the date of publication of the last such periodic notice. Such notice shall, with respect to each amendment or proposed amendment (i) identify the facility involved; and (ii) provide a brief description of such amendment. Nothing in this subsection shall be construed to delay the effective date of any amendment.

(C) The Commission shall, during the ninety-day period following the effective date of this paragraph, promulgate regulations establishing (i) standards for determining whether any amendment to an operating license involves no significant hazards consideration; (ii) criteria for providing or, in emergency situations, dispensing with prior notice and reasonable opportunity for public comment on any such determination, which criteria shall take into account the exigency of the need for the amendment involved; and (iii) procedures for consultation on any such determination with the State in which the facility involved is located.

* * * *

(b) Any final order entered in any proceeding of the kind specified in subsection (a) of this section shall be subject to judicial review in the manner prescribed in

the Act of December 29, 1950, as amended, and to the provisions of section 10 of the Administrative Procedure Act, as amended.

10 CFR § 2.202 (1983)

§ 2.202 Order to show cause.

(a) The Executive Director for Operations during an emergency as determined by the EDO, and Director of Nuclear Reactor Regulation, Director of Nuclear Material Safety and Safeguards, Director, Office of Inspection and Enforcement, and Director, Office of Administration, as appropriate may institute a proceeding to modify, suspend, or revoke a license or for such other action as may be proper by serving on the licensee an order to show cause which will:

(1) Allege the violations with which the licensee is charged, or the potentially hazardous conditions or other facts deemed to be sufficient ground for the proposed action;

(2) Provide that the licensee may file a written answer to the order under oath or affirmation within twenty (20) days of its date, or such other time as may be specified in the order;

(3) Inform the licensee of his right, within twenty (20) days of that date of the order, or such other time as may be specified in the order, to demand a hearing;

(4) Specify the issues; and

(5) State the effective date of the order.

(b) A licensee may respond to an order to show cause by filing a written answer under oath or affirmation. The answer shall specifically admit or deny each allegation or charge made in the order to show cause, and may set forth the matters of fact and law on which the licensee relies. The answer may demand a hearing.

(c) If the answer demands a hearing, the Commission will issue an order designating the time and place of hearing.

(d) An answer or stipulation may consent to the entry of an order in substantially the form proposed in the order to show cause.

(e) The consent of the licensee to the entry of an order shall constitute a waiver by the licensee of a hearing, findings of fact and conclusions of law, and of all right to seek Commission and judicial review or to contest the validity of the order in any forum. The order shall have the same force and effect as an order made after hearing by a presiding officer or the Commission.

(f) When the Executive Director for Operations, during an emergency as determined by the EDO, or the Director of Nuclear Reactor Regulation, Director of Nuclear Material Safety and Safeguards, Director, Office of Inspection and Enforcement, as appropriate, finds that the public health, safety, or interest so requires or that the violation is willful, the order to show cause may provide, for stated reasons, that the proposed action be temporarily effective pending further order.

10 CFR § 2.206 (1983)

§ 2.206 Requests for action under this subpart.

(a) Any person may file a request for the Director of Nuclear Reactor Regulation, Director of Nuclear Material Safety and Safeguards, Director, Office of Inspection and Enforcement, as appropriate, to institute a proceeding pursuant to § 2.202 to modify, suspend or revoke a license, or for such other action as may be proper. Such a request shall be addressed to the Director of Nuclear Reactor Regulation, Director of Nuclear Material Safety and Safeguards, Director, Office of Inspection and Enforcement, as appropriate, and shall be filed either: (1) By delivery to the Public Document Room at 1717 H

Street N.W., Washington, D.C., or (2) by mail or telegram addressed to the Director of Nuclear Reactor Regulation, Director of Nuclear Material Safety and Safeguards, Director, Office of Inspection and Enforcement, as appropriate, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555. The requests shall specify the action requested and set forth the facts that constitute the basis for the request.

(b) Within a reasonable time after a request pursuant to paragraph (a) of this section has been received, the Director of Nuclear Reactor Regulation, Director of Nuclear Material Safety and Safeguards, Director, Office of Inspection and Enforcement, as appropriate shall either institute the requested proceeding in accordance with this subpart or shall advise the person who made the request in writing that no proceeding will be instituted in whole or in part, with respect to his request, and the reasons therefor.

(c) (1) Director's decisions under this section will be filed with the Office of the Secretary. Within twenty-five (25) days after the date of the Director's decision under this section that no proceeding will be instituted or other action taken in whole or in part, the Commission may on its own motion review that decision, in whole or in part, to determine if the Director has abused his discretion. This review power does not limit in any way either the Commission's supervisory power over delegated staff actions or the Commission's power to consult with the staff on a formal or informal basis regarding institution of proceedings under this section.

(2) No petition or other request for Commission review of a Director's decision under this section will be entertained by the Commission.

Nos. 83-703 and 83-1031

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-703

FLORIDA POWER & LIGHT COMPANY,
Petitioner,

v.

JOETTE LORION, *et al.*,
Respondents.

No. 83-1031

UNITED STATES NUCLEAR REGULATORY COMMISSION AND UNITED STATES OF AMERICA,
Petitioners,

v.

JOETTE LORION, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF THE ATOMIC INDUSTRIAL FORUM, INC. AS *AMICUS CURIAE*

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BRIEF OF THE ATOMIC INDUSTRIAL FORUM, INC. AS *AMICUS CURIAE*

Pursuant to Rule 36.2 of the Rules of this Court, the Atomic Industrial Forum, Inc., ("the Forum") submits this brief as *amicus curiae* supporting the position of Florida Power & Light Company, the United States Nuclear Regulatory

Commission, and the United States of America. The Forum has received and filed with the Court the written consents of counsel for each of the parties to appear as *amicus curiae* in this proceeding.

INTEREST OF THE AMICUS CURIAE

The Forum is an association of about 500 domestic and overseas organizations interested in the development of peaceful uses of nuclear energy. Its members include electric utilities, manufacturers, architect-engineers, consulting firms, mining and milling companies, labor unions and others, who design, build, operate, and service facilities for the production of nuclear fuel and the generation of nuclear power. To authorize many of these activities, the Nuclear Regulatory Commission issues several types of licenses, including licenses to construct and operate power reactors, and licenses to possess and use special nuclear material, by-product material and source material. Petitioner, Florida Power & Light Company, is the holder of licenses from the Commission authorizing it to operate power reactors. It is also a member of the Forum. Other members of the Forum are the holders of licenses issued by the Commission. These holders of licenses which are members of the Forum are affected by the outcome of this case.

10 C.F.R. § 2.206 provides that any person may request that the Commission institute a proceeding to modify, suspend or revoke a license or to take other action as may be appropriate. When such a petition is filed, the affected license holder generally will comment in defense of its license. If the petition is granted, a trial-type hearing may be commenced pursuant to 10 C.F.R. § 2.202, in which the license holder will be a party. If the petition is denied and judicial review of the Commission action sought, the license holder will (as here) usually participate by intervening in the judicial proceeding.

Should the judgment of the Court of Appeals not be reversed, there could be four layers of review in connection with the denial by the NRC Staff of petitions filed under 10 C.F.R. § 2.206. The denial may be reviewed by the Commission itself, after which the losing party could seek review in the district courts, the courts of appeals and even the Supreme Court. This

will result in a material increase in the amount of litigation involving petitions filed under Section 2.206 and the district courts could become intimately involved in resolving highly complex technical matters. In addition, judicial review of other NRC decisions could be complicated as a result of uncertainty created by the decision of the Court of Appeals as to the proper federal court in which to seek judicial review. License holders would have no choice but to intervene and participate in this litigation as the real party in interest and in order to protect their licenses. Hence, the Forum, through its members holding NRC licenses, has a vital interest in seeing that the decision of the Court of Appeals is reversed.

STATEMENT OF THE CASE

The Statement of the Case set forth in the Petition for a Writ of Certiorari filed by the Solicitor General [1] and in the Petition for a Writ of Certiorari filed by Florida Power & Light Company [2] set forth the facts in this case. The Forum will rely on those statements of the case. The single issue before the Court is whether the Court of Appeals was correct in holding that it lacked jurisdiction to review orders of the Nuclear Regulatory Commission denying petitions filed under 10 C.F.R. § 2.206.

SUMMARY OF THE ARGUMENT

When Congress enacted the Atomic Energy Act, it made a choice between judicial review in the courts of appeals and review in the district courts. It chose to have expert agency fact-finding and court of appeals review of the agency record. There are exceptions to court of appeals review. District courts have

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[1] Petition for a Writ of Certiorari to the U.S. Court of Appeals for the District of Columbia Circuit on behalf of the U.S. Nuclear Regulatory Commission and the United States ("Petition for Writ of Certiorari on Behalf of NRC") at 2-6, *U.S. Nuclear Regulatory Commission* v. *Lorion*, No. 83-1031 (Supreme Court).

[2] Petition for a Writ of Certiorari to the U.S. Court of Appeals for the District of Columbia Circuit on behalf of Florida Power & Light Company ("Petition for Writ of Certiorari on Behalf of FP&L") at 2-5, *Florida Power & Light Co.* v. *Lorion*, No. 83-703 (Supreme Court).

jurisdiction over certain clearly specified matters arising under the Atomic Energy Act. The instant matter is not among them. None of the matters committed to the district courts involves the review of any step in initial licensing, license suspension or revocation, or rulemaking actions taken by the Commission.

Congress also gave the Commission flexibility to mold its administrative process to the demands of its regulatory mission. The word "proceeding" in Section 2239(a) of the Act covers a variety of procedures ranging from those associated with trial-type hearings to informal notice and comment. Even when the Commission institutes a proceeding which could encompass a trial-type hearing, it may use screening devices to assure that such a hearing is not unnecessarily commenced. For example, a request for a trial-type hearing may be denied in a licensing proceeding if an individual seeks to raise issues which do not meet the threshold requirements for specificity and basis or do not constitute genuine disputes of material fact. Regardless of the exact type of proceeding, a disappointed party may obtain review of NRC actions in a broad range of proceedings in the courts of appeals.

The Court of Appeals nevertheless held that the denial of a petition filed pursuant to Section 2.206 did not constitute a "proceeding" within the meaning of Section 2239(a). It did so because, unlike proceedings set forth in Section 2239(a), a person may not demand a hearing before his petition is denied (which demand the Court of Appeals reasoned was the critical factor in assessing whether such a "proceeding" has commenced), and because such denials may not produce the type of formal record which is usually the predicate for judicial review in the courts of appeals. Neither of these reasons provide a basis for concluding that the denial of a petition filed under Section 2.206 is outside the class of "proceedings" delineated in Section 2239(a).

In view of the flexibility of the Commission to mold its administrative process and the intent of Congress that agency actions be reviewed in the courts of appeals, the Court of Appeals should have construed the word "proceeding" in Section 2239(a) broadly to include any step in a proceeding,

including the denial of a petition filed under Section 2.206. The result reached by the Court of Appeals would require the Commission to return to the Congress to clarify the application of Section 2239(b) every time the Commission fashioned a new proceeding like Section 2.206 within the broad scope (but not necessarily the explicit wording) of Section 2239(a). Denial of a petition filed under Section 2.206 is analogous to the denial of a hearing request when the individual seeking a hearing fails to raise a genuine dispute of material fact. In addition, the record generated by the Commission when it denies a petition filed pursuant to Section 2.206 is in most cases sufficiently developed to allow meaningful review. In fact, it is often comparable to the record generated in a licensing or rulemaking proceeding within the meaning of Section 2239(a) in which notice and comment is solicited. Further, should the record be inadequate for review in a particular case, the matter can be remanded to the Commission.

The decision of the Court of Appeals should also be reversed because it results in duplicative, fragmented and unnecessarily complex judicial review of Commission actions. Under the Court of Appeals decision, review of the denial of a petition filed pursuant to Section 2.206 could be before the Commission itself, the district courts, the courts of appeals and the Supreme Court. Fragmented review of a Commission action relating to licensing could also be possible if, when granting a license, the Commission simultaneously denies a petition filed under Section 2.206 and in parallel completes trial-type hearings on the issuance of a license. Denial of the petition would be reviewed in the district courts while issuance of a license following the hearings would be reviewed in the courts of appeals. Finally, if the rationale of the Court of Appeals is extended to other Commission actions analogous to the denial of a petition filed under Section 2.206, such as the denial of a petition for rulemaking filed pursuant to 10 C.F.R. § 2.803, questions could be raised as to whether such action is reviewable in the district courts as suggested by the reasoning below or, as clearly intended by Congress, in the courts of appeals.

ARGUMENT

I. The Construction of Section 2239 by the Court of Appeals Fails to Account for the Overall Structure of the Hearing and Judicial Review Provisions of the Atomic Energy Act

The Court of Appeals characterized Section 2239 as an "unusual statute 'which defines a reviewable order with such limiting circumstantiality that a number of determinative agency actions cannot be possibly squared with the requirements.'"[3] It further observed, "Given this unusually self-contained statutory scheme, there is no room in which to import the well-founded presumption against bifurcation of judicial forums."[4] But Congress manifested no intention of limiting Section 2239(a) to only "formal" proceedings, thereby limiting review in the courts of appeals under Section 2239(b) to Commission actions taken following the completion of such proceedings. In fact, the structure of Section 2239 and the Atomic Energy Act as a whole suggests strongly that review of the denial of a petition filed under Section 2.206 be in the courts of appeals, like review of all other actions of the Commission not expressly conferred on the district courts.

Section 2239(a) reflects the incorporation in the Atomic Energy Act of a traditional regulatory scheme encompassing a number of types of proceedings. These include "proceedings" for (a) the granting, suspending, revoking, or amending of any license or construction permit; (b) the issuance or modification of rules or regulations dealing with the activities of licensees; and (c) the payment of compensation and award or royalty.

Because Section 2239(a) is so broad, the type of proceeding it requires is defined by the nature of the Commission action involved.[5] For example, a proceeding for the issuance of a license to possess special nuclear material, by-product material

[3] *Lorion* v. *U.S. Nuclear Regulatory Commission,* 712 F.2d 1472, 1478 (D.C. Cir. 1983) (citation omitted), *cert. granted,* 52 U.S.L.W. 3701 (1984).

[4] *Id.*

[5] *Siegel* v. *Atomic Energy Commission,* 400 F.2d 778, 785-86 (D.C. Cir. 1968).

or source material encompasses only informal notice and comment, whereas a proceeding for the issuance of a power reactor license has encompassed a trial-type hearing.[6] Similarly, a proceeding involving the issuance or modification of rules and regulations governing the activities of licensees (including power reactor licensees) encompasses only informal notice and comment,[7] although the Commission has on occasion used more elaborate procedures.[8] Lastly, the Commission may, through the issuance of rules and regulations, impose requirements on power reactor licensees on a generic basis, rather than offering the opportunity for a trial-type hearing on every license effectively so amended.[9] All of these proceedings lead to final agency action which is reviewable in the courts of appeals under Section 2239(b).

Even when persons affected by Commission action are entitled in a proceeding to demand a trial-type hearing, their request will not always be granted. Thus, the fact that a "proceeding" within the meaning of Section 2239(a) may have commenced does not mean that a trial-type hearing will necessarily take place. 10 C.F.R. § 2.714(b) requires that unless a person seeking a trial-type hearing establishes at least one contention with basis and specificity, his hearing request can be denied.[10] Additionally, 10 C.F.R. § 2.749 provides for the granting of summary disposition in all but mandatory construction permit proceedings [11] without evidentiary hearings if there are no material facts in dispute, even though a hearing would otherwise be held. Finally, the Commission has the substantive discretion to decide the issues to be addressed in a

[6] *City of West Chicago, Illinois* v. *U.S. Nuclear Regulatory Commission,* 701 F.2d 632, 641-45 (7th Cir. 1983).

[7] *Connecticut Light & Power Co.* v. *Nuclear Regulatory Commission,* 673 F.2d 525 (D.C. Cir.), *cert. denied,* 51 U.S.L.W. 3254 (1982).

[8] *Vermont Yankee Nuclear Power Corp.* v. *NRDC,* 435 U.S. 519, 542 n. 17 (1978).

[9] *See* Section 187 of the Atomic Energy Act, 42 U.S.C. § 2237, and *Union of Concerned Scientists* v. *Nuclear Regulatory Commission,* 711 F.2d 370, 380 (D.C. Cir. 1983).

[10] *BPI* v. *Atomic Energy Commission,* 502 F.2d 424 (D.C. Cir. 1974).

[11] 10 C.F.R. § 2.749(d).

trial-type hearing and thereby to exclude issues an interested party may wish to raise in a hearing. As a corollary, the Commission may deny persons the right to intervene in a trial-type hearing if they do not oppose the action NRC proposes to take.[12] Denials on these grounds of demands for trial-type hearings are reviewable in the courts of appeals.

The significance of this legislative and regulatory scheme is three-fold. First, it demonstrates that Congress intended for the Commission to fashion administrative procedures capable of satisfying its regulatory mission without having to seek specific Congressional approval. Thus, the Commission can take action either through informal notice and comment or through trial-type hearings, with features of either as the case may require. And, when it adopts the latter course, it may impose screening devices which limit the scope of the trial-type hearings to only specifically stated, relevant and material issues for which there is some basis. This flexibility is a hallmark of the Atomic Energy Act.[13]

Second, the overall structure of the Act indicates that Congress clearly preferred for the courts of appeals to review NRC licensing actions, regardless of the type of procedures used in taking those actions. This view is confirmed by provisions of the Act other than Section 2239(a), setting forth those matters arising under the Atomic Energy Act over which the district courts have jurisdiction. These provisions include Section 2280 (Injunctions); Section 2281 (Contempt Proceedings); and Section 2282 (Civil Monetary Penalties for Violations of Licensing Requirements). None of these matters involves the review of actions involving initial licensing, license suspension or revocation, license renewal, or license amendment taken by the Commission.

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[12] *Bellotti* v. *NRC*, 725 F.2d 1380 (D.C. Cir. 1983).

[13] When Congress enacted the Atomic Energy Act it adopted "a regulatory scheme which is virtually unique in the degree to which broad responsibility is reposed in the administrative agency, free of close prescription in its charter as to how it shall proceed in achieving its statutory objectives." *Siegel* v. *Atomic Energy Commission, supra,* 400 F.2d at 783.

Third, by lodging judicial review of NRC actions relating to licenses in the courts of appeals and by providing the Commission with the administrative flexibility to shape its procedures to accommodate its regulatory mission, it is reasonable to assume that Congress would have expected the provisions in the Atomic Energy Act governing judicial review to be broadly construed in accordance with this regulatory scheme. Thus, if the Commission were to develop new procedures governing actions relating to licenses which, according to the Court of Appeals' reasoning, did not fit neatly into the literal language of Section 2239(a), but which were authorized under the Act, it would better carry out the intent of Congress to treat those procedures as falling within the general class of licensing proceedings enumerated in Section 2239(a) than to exclude them and require the Commission to seek either legislative clarification or accept district court review. There is no basis in the Act or its legislative history for requiring the Commission to return to Congress for clarification of the application of Section 2239(b) every time the Commission fashions such a new procedure. While Section 2239 in relevant part is unchanged since 1954, Section 2.206 was a new procedure adopted in 1974.[14] Contrary to the conclusion of the Court of Appeals, there is every reason here to indulge the well-founded presumption against bifurcation of review.[15]

Accordingly, the question raised by *Lorion* is what fundamentally distinguishes the denial of a petition filed under Section 2.206 from other comparable proceedings, the results of which are reviewable in the courts of appeals. *Lorion* posits two differences. First, it suggests that (a) unlike proceedings set forth in Section 2239(a), persons may not demand a hearing before their petition filed under Section 2.206 is denied and (b) unless and until such a demand can be made, a proceeding within the meaning of Section 2239(a) does not exist.[16] Second, *Lorion* implies that the district courts are better able to review the denial of a petition filed under Section 2.206 because such denials may not produce the type of formal record

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[14] 39 Fed. Reg. 12353 (1974).

[15] *See* note 4, *supra,* and accompanying text.

[16] *Lorion* v. *U.S. Nuclear Regulatory Commission, supra,* 712 F.2d at 1474.

which is usually the predicate for review in the courts of appeals.[17] Neither of these differences is meaningful when the denial of a petition filed under Section 2.206 is compared to other actions which are undeniably in the class of "proceedings" delineated in Section 2239(a).

First, it elevates form over substance to distinguish the denial of a petition filed pursuant to Section 2.206 from other proceedings of the type set forth in Section 2239(a) on the ground that in the former individuals may not demand a hearing prior to such agency action. If a petition filed under Section 2.206 is granted, an adjudicatory hearing may be commenced and the petitioner may become a party thereto.[18] Thus, the first step a petitioner under Section 2.206 must take to be granted a hearing is to convince the Commission that he has raised an issue of significance such that a hearing should be held. Should the petitioner be unable to do so, review is available in the courts of appeals, which possibly could lead to the remand of the proceedings to the NRC for a hearing.[19]

This treatment of a petition filed under Section 2.206 is not materially different from the treatment by the Commission of hearing requests in other proceedings of the type set forth in Section 2239(a). In such proceedings, an individual may be denied a hearing for failure to raise a valid contention within the scope of a proceeding or for failure to overcome a motion for summary disposition filed pursuant to 10 C.F.R. § 2.749. Just as the petitioner requesting a hearing in those cases may have his request denied in a proceeding under Section 2239(a), so may a petitioner under Section 2.206 have a petition denied and thereby lose his opportunity to have a hearing. In both instances, a "necessary first step" [20] would have been taken in a proceeding which could have culminated in a hearing and in

[17] *Id.* at 1476, quoting *Rockford League of Women Voters* v. *Nuclear Regulatory Commission*, 679 F.2d 1218, 1220-21 (7th Cir. 1982)

[18] 10 C.F.R. §§ 2.202, 2.206 and 2.714.

[19] *See* note 28, *infra.*

[20] *Natural Resources Defense Council, Inc.*, v. *U.S. Nuclear Regulatory Commission*, 606 F.2d 1261, 1265 (D.C. Cir. 1979).

both instances the party seeking to trigger such hearing would have failed to satisfy a condition precedent for its commencement.[21]

Accordingly, the denial of a petition filed under Section 2.206 is simply one of several devices used by the Commission to determine whether a hearing actually should be held. To conclude that such action is not a "proceeding" within the meaning of Section 2239(a) on the ground that the petitioner does not receive a formal hearing at that threshold stage is to elevate form over substance.

Lorion also suggests that the denial of a petition filed pursuant to Section 2.206 does not constitute a "proceeding" within the meaning of Section 2239(a) because the record generated by such agency action may be inadequate to permit meaningful review. The Court of Appeals assumed that the district court would be better able to reconstruct the record on which denial of the petition was based.[22]

This assumption does not support the conclusion that a denial of a petition filed under Section 2.206 is not a "proceeding" within the meaning of Section 2239(a), nor does it provide a basis for attributing an intention to Congress that it would prefer the district courts to review such denials.[23] When the

[21] When viewed in this light, a "proceeding" does not mean one thing for procedural purposes under Section 2239(a) and another for jurisdictional purposes under Section 2239(b), as the Court of Appeals reasoned. *Lorion* v. *U.S. Nuclear Regulatory Commission, supra,* 712 F.2d at 1478. Rather, a "proceeding" under Section 2239(a) is commenced with the filing of a petition pursuant to Section 2.206 which in turn could lead to a hearing. To the extent that *Porter County Chapter of the Izaak Walton League* v. *Nuclear Regulatory Commission,* 606 F.2d 1363 (D.C. Cir. 1979), and *Illinois* v. *Nuclear Regulatory Commission,* 591 F.2d 12 (7th Cir. 1979), can be construed to suggest otherwise, the "not a proceeding" rationale, but not the holdings, of those cases should be rejected.

[22] *Lorion* v. *U.S. Nuclear Regulatory Commission, supra,* 712 F.2d at 1476, citing *Rockford League of Women Voters* v. *Nuclear Regulatory Commission, supra.*

[23] In this regard, the Forum agrees with the observation by Florida Power & Light Company that because the administrative record provides an adequate basis for judicial review, district court fact-finding would be inappropriate. Petition for Writ of Certiorari on Behalf of FP&L at 12-13.

NRC Staff denies a petition filed under Section 2.206, it is required to advise the person of such action and state its reasons for doing so.[24] This process alone results (as it did here) in a record which is sufficiently developed to permit judicial review. Indeed, in this proceeding the reviewing court will have before it a record of 547 pages of materials along with the seven page decision of the Director of Nuclear Reactor Regulation explaining the reasons for the denial.[25]

Moreover, the Commission typically publishes a notice of receipt of petitions filed under Section 2.206 in the *Federal Register* so that public comments may be submitted.[26] This practice is no less elaborate than that followed by the NRC in notice and comment rulemaking or when it issues a special nuclear by-product, or source material license.[27] All of these are Commission actions which are "proceedings" within the meaning of Section 2239(a), and which, therefore, are reviewable in the courts of appeals.[28] Accordingly, the state of the record does not provide a basis for concluding that the review of Commission action denying a petition filed under Section 2.206 is lodged in the district courts.

At bottom, the Court of Appeals in *Lorion* relied upon an overly narrow and exclusionary construction of Section

[24] 10 C.F.R. § 2.206(b).

[25] Petition for Writ of Certiorari on Behalf of NRC at 5; *Florida Power & Light Co.* (Turkey Point Plant, Unit 4), DD-81-21, 14 NRC 1078 (1981).

[26] The Commission does not publish notices of receipt for those petitions which are obviously without merit. 42 Fed. Reg. 36239 (1977).

[27] *City of West Chicago, Illinois* v. *U.S. Nuclear Regulatory Commission, supra,* 701 F.2d at 641-45.

[28] In addition, "an appellate court is not without recourse in the event it finds itself unable to exercise informed judicial review because of an inadequate administrative record. In such a situation, an appellate court may always remand a case to the agency for further consideration." *Harrison* v. *PPG Industries, Inc.,* 446 U.S. 578, 594 (1980). This Court very recently concluded that the district court lacked jurisdiction to review Federal Communication Commission actions when the same conduct could be and was being reviewed in the court of appeals on denial of a rulemaking petition, and again suggested remand to the agency if the record was not adequate for review. *Federal Communications Commission* v. *ITT World Communications, Inc.,* 52 U.S.L.W. 4507, 4509 (1982).

2239(a). In doing so, it ignored the flexibility given to the Commission by Congress to fashion its own administrative process and the Congressional desire reflected in the structure of the Act as well as Section 2239(a) that review of all actions relating to licenses be in the courts of appeals. For this reason alone, the decision of the Court of Appeals should be reversed.

II. The Decision by the Court of Appeals Will Unnecessarily Prolong, Fragment and Complicate Judicial Review of A Number of NRC Proceedings

Numerous decisions of this and other courts have construed special review statutes to avoid bifurcated review and to obviate duplicate judicial review of agency action.[29] The Court of Appeals reached a contrary result in this case based on its unnecessarily constricted reading of Section 2239(a), and its observation that absent legislative history to the contrary, there is no reason to conclude that Congress "envisioned its jurisdictional grant in Section 2239(b) to extend beyond orders entered in formal hearings."[30] Because the decision by the Court of Appeals results in bifurcated and duplicative review of NRC licensing decisions, the Court of Appeals should have been unwilling, absent a clear expression of Congressional intent, to read the Act as creating such a "seemingly irrational bifurcated system."[31] Similarly, the Court of Appeals should not have so narrowly construed Section 2239(a) when the effect of doing so is to complicate needlessly the judicial review of licensing actions by the Commission.

Unless *Lorion* is reversed, there will be four layers of review available to the losing party whenever a petition filed pursuant to Section 2.206 is denied. First, the Commission itself may elect to review the decision in accordance with

[29] *E.g., Crown Simpson Pulp Co.* v. *Costle,* 445 U.S. 193 (1980); *Harrison* v. *PPG Industries, Inc., supra; Amusement and Musical Operators Ass'n.* v. *Copyright Royalty Tribunal,* 636 F.2d 531, 534, *cert. denied,* 450 U.S. 912 (1981); *Investment Co. Institute* v. *Board of Governors of Federal Reserve System,* 551 F.2d 1270, 1276 (D.C. Cir. 1977).

[30] *Lorion* v. *U.S. Nuclear Regulatory Commission, supra,* 712 F.2d at 1478.

[31] *Crown Simpson Pulp Co.* v. *Costle, supra,* 445 U.S. at 197.

Section 2.206(c)(1). Whether or not it does so, when the denial becomes final agency action, the petitioner would then be able to seek judicial review of the denial in the district courts, after which further review could be sought in the courts of appeals and the Supreme Court. Commenting on these successive layers of review, one court stated, "This is too much." [32]

In addition to duplicate layers of review, *Lorion* would result in fragmented review of Commission licensing decisions. First, if a petition filed under Section 2.206 were granted in part and denied in part, those aspects of the petition denied would, when final, be reviewed in the district courts. However, any Commission order resulting from the aspects of the petition granted would be entered in a "proceeding" within the construction of Section 2239(a) by the Court of Appeals,[33] and would, therefore, be reviewable in the courts of appeals.

Second, if there were an ongoing hearing regarding the issuance of an operating license for a power reactor and a petition were filed pursuant to Section 2.206 requesting that an already outstanding license for that facility [34] be suspended or revoked for reasons other than those being litigated in the hearing, judicial review of the issuance of such license would be split between the district courts and courts of appeals. To the extent that the Commission issued the license based on its resolution of matters addressed in the operating license hearings, its action would be reviewed in the courts of appeals. To the extent that the Commission did not suspend the underlying license (subsumed in the operating license as explained in the margin, n. 34, *supra*) based on its denial of the petition filed under Section 2.206, its action would be reviewed in the district courts.

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[32] *Rockford League of Women Voters* v. *U.S. Nuclear Regulatory Commission, supra,* 679 F.2d at 1221.

[33] *See* 10 C.F.R. §§ 2.206, 2.202 and 2.714.

[34] Such licenses could include a construction permit, a 10 C.F.R. Part 70 license permitting preoperational storage of unirradiated nuclear fuel, or a low power testing license, any of which would normally be subsumed in the operating license, when issued.

Finally, *Lorion* raises a variety of questions as to whether Commission actions analogous to the denial of a petition filed pursuant to 10 C.F.R. § 2.206 are reviewable in the district courts or courts of appeals. For example, 10 C.F.R. § 2.802(a) provides that any interested person may petition the Commission to issue, amend or rescind any regulation. 10 C.F.R. § 2.803 further provides

> No hearing will be held on the petition unless the Commission deems it advisable. If the Commission determines that sufficient reason exists, it will publish a notice of proposed rulemaking. In any other case, it will deny the petition and will notify the petitioner with a simple statement of the grounds of denial.

Under the reasoning of *Lorion,* such denial would appear to be reviewable only in the district courts because a rulemaking "proceeding" of the formal type contemplated by the Court of Appeals would not exist. The petitioner for rulemaking would not have been able to demand a "formal hearing" (in this case informal notice and comment), prior to the denial of his petition. Even though the Commission would have set forth a statement of the grounds for its denial, because a "proceeding" (in the *Lorion* sense) had not commenced, review of a denial of the petition would be lodged in the district courts. Thus, duplicative review of the denial of petitions for rulemaking could result from *Lorion,* even though the Act is structured such that the courts of appeals review final Commission actions issuing or modifying rules and regulations dealing with the activities of licensees.

Similarly, the Commission has the authority on its own to revoke, suspend or modify a license.[35] If it suspends a construction permit for a power reactor until specified corrective action is taken, it is possible that an interested member of the public would request that the Commission superimpose a further suspension and not reinstate the permit until additional actions are taken. If the Commission denies the request and review is sought, it is unclear from *Lorion* which federal courts would

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[35] 10 C.F.R. § 2.202.

have jurisdiction over the action. If the request to maintain a suspension in force and not to reinstate the license is viewed as a petition filed under Section 2.206, then reinstatement arguably would be reviewable in the district courts under *Lorion*. However, if reinstatement of the permit is viewed correctly, *i.e.*, as the end of an enforcement proceeding commenced under Section 2.202, then review of the Commission action would be appropriately had in the courts of appeals.

Accordingly, the decision by the Court of Appeals in *Lorion* unnecessarily prolongs, fragments and complicates judicial review of NRC licensing actions. In the absence of any evidence that Congress intended such a review procedure, the construction of Section 2239(a) by the Court of Appeals in *Lorion* should be rejected.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals is incorrect and should be reversed.

Respectfully submitted,

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Nos. 83-703 and 83-1031

In the Supreme Court of the United States

OCTOBER TERM, 1983

FLORIDA POWER & LIGHT COMPANY, PETITIONER

v.

JOETTE LORION, ETC., ET AL.

UNITED STATES NUCLEAR REGULATORY COMMISSION AND UNITED STATES OF AMERICA, PETITIONERS

v.

JOETTE LORION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL PETITIONERS

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53pp

QUESTION PRESENTED

Whether the court of appeals had jurisdiction under 28 U.S.C. 2342(4) and 42 U.S.C. 2239(b) to review a Nuclear Regulatory Commission order denying respondent's request for suspension of a nuclear power plant's operating license.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-15)[1] is reported at 712 F.2d 1472. The decision of

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[1] "Pet. App." refers to the Appendix to the Petition in No. 83-703.

the Director of the Office of Nuclear Reactor Regulation (Pet. App. 16-25) is reported at 14 N.R.C. 1078.

JURISDICTION

The judgment of the court of appeals (83-1031 Pet. App. 1a-2a) was entered on July 26, 1983. A petition for rehearing was denied on September 22, 1983 (*id.* at 3a-5a). The petition for a writ of certiorari in No. 83-703 was filed on October 28, 1983, and the petition in No. 83-1031 was filed on December 21, 1983. The petitions were granted and the cases were consolidated on March 26, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES AND REGULATIONS INVOLVED

28 U.S.C. 2342(4) is reproduced at Pet. App. 26. Section 189 of the Atomic Energy Act of 1954, 42 U.S.C. 2239, is reproduced at Pet. App. 26-28. 10 C.F.R. 2.202 and 2.206 are reproduced at Pet. App. 28-31.

STATEMENT

1. Section 2342(4) of Title 28 of the United States Code provides that the courts of appeals have exclusive jurisdiction to review "all final orders of the [Nuclear Regulatory] Commission made reviewable by section 2239 of title 42." The provision referred to—Section 189 of the Atomic Energy Act—deals with hearings and judicial review. Section 189(a) (42 U.S.C. 2239(a))[2] provides that

[2] Congress amended Section 189(a) in 1983. NRC Authorization Act, Pub. L. No. 97-415, § 12, 96 Stat. 2073. The amendments were intended to overturn the decision in *Sholly* v. *NRC*, 651 F.2d 780 (D.C. Cir. 1980), vacated, No. 80-1640 (Feb. 22, 1983), which had held improper the Commission's practice of not providing a prior hearing on license amendments not involving significant hazards considerations. Since the amendment has not yet been codified, we will refer throughout to 42 U.S.C. 2239(a) or Section 189(a) as a shorthand for the currently effective version.

> (1) In any proceeding under this chapter, for the granting, suspending, revoking, or amending of any license or construction permit, * * * and in any proceeding for the issuance or modification of rules and regulations dealing with the activities of licensees, * * * the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to such proceeding.

Section 189(b) (42 U.S.C. 2239(b)) states that

> [a]ny final order entered in any proceeding of the kind specified in subsection (a) of this section shall be subject to judicial review in the manner prescribed in [28 U.S.C. 2342(4)].

NRC regulations permit the Director of the Office of Nuclear Reactor Regulation to begin a proceeding for suspending, revoking, or modifying a license by serving on the licensee an order to show cause alleging either the violations with which the licensee is charged, or other facts deemed sufficient to warrant the proposed action. The licensee then answers and may demand a hearing. 10 C.F.R. 2.202.

The regulations also permit any person to request that the Director institute such a proceeding.[3] Re-

[3] In the early 1970's the Commission had no formal means of dealing with citizens' letters requesting specific enforcement action against licensees. See, *e.g.*, Memorandum and Order Regarding Filing of Petition for Shutdown of Certain Reactors, 38 Fed. Reg. 23815 (1973). The Commission

quests must specify what action is desired, and must set forth supporting facts. 10 C.F.R. 2.206(a). Upon receipt of such requests, the NRC typically publishes a notice in the Federal Register so that comments may be submitted.[4] The Director is then required, within a reasonable time, either to issue a show cause order against the licensee, or to advise the person who made the request of his reasons for declining to act. 10 C.F.R. 2.206(b).

The NRC has interpreted Section 2.206 to require the issuance of a show cause order if a "substantial health or safety issue ha[s] been raised" by the request. *In re Consolidated Edison Co.* (*Indian Point, Units 1, 2 & 3*), 2 N.R.C. 173, 176 (1975). In deciding whether to issue a show cause order, the Director does not hold any kind of formal hearing. He "is free to rely on a variety of sources of information, including staff analyses of generic issues, documents issued by other agencies, and the comments of the license on the factual allegations." *In re Northern Indiana Public Service Co.* (*Bailly Generating*

adopted 10 C.F.R. 2.206 in 1974 "to provide a procedure for the submittal of such requests to the Director of Regulation." 39 Fed. Reg. 12353 (1974).

[4] In 1983 the Commission received 28 petitions under Section 2.206. In 19 of those cases it published notice that it had received the request. See 48 Fed. Reg. 4589, 10150, 13300, 21225, 23502, 27327, 31119, 34371, 44687, 44688, 48881, 48882, 49395, 52370(2), 54550, 56127, 57037 (1983); 49 Fed. Reg. 4572 (1984).

Section 2.206 requests may at times lead to rather elaborate, though informal, proceedings. For example, in *In re Public Service Co. (Marble Hill Nuclear Generating Station, Units 1 & 2)*, 14 N.R.C. 1085 (1981), the proceeding consisted in part of nine submissions by the petitioner, including two Section 2.206 requests, a Section 2.206 denial, a request by the Commission for further comments, and a supplemental Section 2.206 denial.

Station, Nuclear-1), 7 N.R.C. 429, 433 (1978), aff'd, 606 F.2d 1364 (D.C. Cir. 1979). The Director's decision not to institute a proceeding is reviewable by the Commission on its own motion (10 C.F.R. 2.206(c)).

2. On September 11, 1981, respondent Joette Lorion ("respondent"), on behalf of the Center for Nuclear Responsibility, wrote a letter to the NRC asking that it shut down Florida Power & Light Company's Turkey Point Plant, Unit 4 (J.A. 6-8). Respondent asserted that the steam generators needed to be inspected (*id.* at 7). She also claimed that the steam generator tubes should be examined for possible leaks (*id.* at 7-8). Finally, she asked the Commission to consider suspending the plant's operating license because of concerns over the safety of the reactor pressure vessel in the event of thermal shock (*id.* at 6, 8). Treating respondent's letter as a request under 10 C.F.R. 2.206, the Commission referred it to the Director of Nuclear Reactor Regulation (Pet. App. 2-3).

On the basis of a 547-page record, the Director issued a decision on November 5, 1981, denying respondent's request.[5] He concluded that the issue of shutting down the plant for inspection of its steam generators was moot, since that very action had been taken on October 18, 1981 (Pet. App. 19).

The Director went on to review the relevant provisions of the utility's license and amendments dealing with the matter of steam generator tube leakage. He also examined the plant's operations since 1976 " 'under strict requirements imposed by the NRC staff' " to deal with that problem. Pet. App. 17 (quoting *Florida Power & Light Co.* (*Turkey Point Plant, Unit 3*), 12 N.R.C. 386, 388 (1980)). He concluded

[5] Portions of the record are reproduced at C.A. App. 1-164.

that respondent had not "advance[d] any factual basis for anticipating" that "a handful of tubes" might rupture (Pet. App. 21). In any event, the Director found that the question was being closely monitored, and that "[t]he procedures and safeguards instituted in relation to that problem are sufficient to safeguard the public health and safety" (Pet. App. 22).

Finally, the Director examined the question of thermal shock to reactor pressure vessels, and actions by the NRC staff and the utility for dealing with that issue. He determined that the condition of the reactor pressure vessel did not warrant a proceeding for license suspension, given the ongoing supervision of that matter by the NRC staff and the study, then in progress, of Unit 4's pressure vessel (*id.* at 22-24). The Director's decision was filed with the Commission in accordance with 10 C.F.R. 2.206(c). The Commission declined to disturb the Director's decision.[6]

3. Respondent then filed a petition for review in the court of appeals pursuant to 28 U.S.C. 2342(4) and Section 189(b) of the Act. She argued that the decision not to issue a show cause order was arbitrary and capricious, and that (given the express terms of Section 189(a)) the Commission had improperly declined to hold a hearing on her request. Although no party questioned its jurisdiction, the

[6] When she received the Director's decision, and before the time during which the Commission could exercise its sua sponte power of review had expired, respondent notified the Commission that her letter had been only advisory, and that she had not intended it to be a formal petition under 10 C.F.R. 2.206. She requested that the Commission vacate the Director's decision for that reason.

court of appeals held that it lacked jurisdiction to review the denial of respondent's request.[7]

The court began by noting the established principle that the NRC need not hold a hearing in passing on a Section 2.206 request, since that determination was not "a 'proceeding' under 42 U.S.C. § 2239(a)" (Pet. App. 7). See *Porter County Chapter of the Izaak Walton League* v. *NRC*, 606 F.2d 1363 (D.C. Cir. 1979); *Illinois* v. *NRC*, 591 F.2d 12 (7th Cir. 1979).[8] The court found this principle inconsistent with "a separate line of authority" holding that the consideration and denial of a Section 2.206 request *was* a "proceeding" under 42 U.S.C. 2239(b) for purposes of judicial review, and so was reviewable in the court of appeals (Pet. App. 8). See *Seacoast Anti-Pollution League* v. *NRC*, 690 F.2d 1025 (D.C. Cir. 1982); *Rockford League of Women Voters* v. *NRC*, 679 F.2d 1218 (7th Cir. 1982). See also *Natural Resources Defense Council, Inc.* v. *NRC*, 606 F.2d 1261 (D.C. Cir. 1979). The proper resolution of that inconsistency, the court concluded, was to

[7] The court did find, as an initial matter, that the NRC had properly treated respondent's letter as a request under 10 C.F.R. 2.206. It also noted that none of the arguments raised by respondent under the National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.*, were properly before the court, since they had not been first presented to the agency (Pet. App. 4).

[8] The NRC stated in its brief in the court of appeals that "[a] request under 10 C.F.R. 2.206 is not a licensing proceeding within the meaning of Section 189" (C.A. Br. 23 n.8). This statement was made in response to respondent's argument that every Section 2.206 request deserved a formal, adjudicatory hearing. It was not intended as a concession that denial of such requests without a hearing was not reviewable in the court of appeals. In the petition for rehearing counsel for the NRC acknowledged the failure to make this distinction clear.

permit review in the courts of appeals only of final orders entered in "formal 'proceedings' "—*i.e.*, those where a hearing is held (Pet. App. 11). Orders terminating "the informal process" appropriate to Section 2.206 requests, by contrast, would fall within the general federal question jurisdiction of the district courts (Pet. App. 10-11). See 28 U.S.C. 1331.

The court accordingly transferred the case to the district court pursuant to 28 U.S.C. 1631 (Pet. App. 15). The government sought rehearing en banc on the question of jurisdiction, but its request was denied (83-1031 Pet. App. 3a-5a).

SUMMARY OF ARGUMENT

The language and history of Section 189 of the Atomic Energy Act support direct review of this case in the court of appeals. That result is bolstered by compelling practical considerations.

A. 1. Section 189(a) makes clear that there may be "proceedings" in which no hearing is held, *e.g.*, because none is requested, or because there is no issue of fact to be determined. The Administrative Orders Review Act (Hobbs Act)—under which review should take place in this case—uses the term "proceedings" in the same sense. It is true that Section 189(a) says that "the Commission *shall* grant a hearing" in any proceeding. But that language does not bind the Commission to go through wasted motion, or to carry out a full-scale enforcement action where there is no substantial health or safety issue. The Seventh Amendment also says that "the right of trial by jury *shall* be preserved" in suits at common law; but it does not require that a jury be empanelled where there is no genuine issue of material fact. See Fed. R. Civ. P. 56(c).

2. Language in two cases suggests that no hearing need be held on Section 2.206 requests, because NRC determinations under that regulation are not "proceedings" for purposes of Section 189(a). But a more careful reading of those cases makes clear that they in fact stand for a more obvious principle: that the Commission's rules can "require[] an applicant who seeks a hearing to meet a threshold burden of tendering evidence suggesting the need for a hearing." *Costle* v. *Pacific Legal Foundation*, 445 U.S. 198, 214 (1980).

Since the term "proceedings" in Section 189(a) is not limited to cases in which "formal hearings" are held (Pet. App. 13), there is no obstacle to court of appeals review of this case under Section 189(b), which says that "[a]ny final order entered in any proceeding of the kind specified in subsection (a) of this section shall be subject to judicial review in [the courts of appeals]."

B. The legislative history of Section 189 also supports court of appeals review in this case.

1. The history of that section shows that Congress intended the courts of appeals to review all NRC orders affecting licensees. The original bill introduced in Congress authorized court of appeals review of "any order of the Commission," including any action taken "in connection with" the revocation or modification of a license. H.R. 8862, 83d Cong., 2d Sess. §§ 188, 189 (1954). Although that authorization was substantially curtailed after hearings, it was later reexpanded to its current form in order "to clarify the intent of Congress with respect to the extent of the applicability of [court of appeals review]." 100 Cong. Rec. 10686 (1954).

The legislative history shows still more clearly that the right to direct review was not intended to depend

on whether a hearing was held. The original bill, which did provide for direct review, did not even include the right to a hearing. That right was later added to Section 181. And shortly before passage the hearing provision was moved to Section 189. That change was made in order to limit the right to a hearing to licensing cases where review was available. But it inverts Congress's purpose to say that the right to direct review depends on whether a hearing was held.

2. Congress's choice of the Hobbs Act to govern review in the courts of appeals was also significant. That Act, passed only four years before the Atomic Energy Act, is expressly designed to permit review of agency orders entered where no hearing has been held. In passing the Hobbs Act Congress had uppermost in its mind orders of the Federal Communications Commission—the very agency whose licensing scheme is copied in the Atomic Energy Act. FCC orders are reviewable in the courts of appeals even where no hearing is held.

C. Our interpretation of Section 189 is supported by compelling practical considerations. The court of appeals' construction will predictably lead to simultaneous review, in the district courts and the courts of appeals, of closely connected NRC orders. Even where simultaneous review does not occur, the court's decision will necessitate wasteful serial review. "This in turn implies five tiers of potential judicial or quasi-judicial review of the petitioner's request * * *: by the Director of Nuclear Reactor Regulation, by the full Commission, by the district court, by the court of appeals, and by the Supreme Court. This is too much." *Rockford League of Women Voters* v. *NRC*, 679 F.2d at 1221.

District court review is unnecessary in this class of cases, because there is no need for fact-finding and issue-clarification. In fact, the courts of appeals can perform the job of review *better* than the district courts. They have developed a reservoir of experience in this area precisely because Section 189(b) requires them to review all the other cases involving NRC license orders and rulemaking proceedings.

ARGUMENT

THE COURTS OF APPEALS HAVE EXCLUSIVE JURISDICTION TO REVIEW NRC ORDERS DENYING SECTION 2.206 REQUESTS

The issue in this case is whether the denial of a Section 2.206 request terminates the kind of "proceeding" that Section 189(b) of the Atomic Energy Act makes reviewable in the courts of appeals. That question cannot be resolved with absolute certainty by reference to either the language or the legislative history of Section 189, since the procedure created by Section 2.206—private requests for enforcement action—did not exist at the time the Atomic Energy Act was enacted. See note 3, *supra*.[9] We believe,

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[9] We note at the outset that there is nothing unique about the promulgation of regulations, like 10 C.F.R. 2.206, that augment the number of orders reviewable in the courts of appeals. This Court addressed that very issue in *Foti* v. *INS*, 375 U.S. 217, 229-230 & n.16 (1963), where it held:

> We see nothing anomalous about the fact that a change in the administrative regulations may effectively broaden or narrow the scope of review available in the Courts of Appeals.[16]

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[16] * * * While presumably denials of § 243(h) relief were not covered by § 106(a) at the time of its enactment, it does not seem incongruous to assume that such

nevertheless, that the most natural construction of Section 189 directs that review should occur in the courts of appeals. This conclusion is also most consistent with the indications of congressional intent that appear in the legislative history. One should not strain to reach a different conclusion, since compelling practical considerations support that result.

A. The Language And Structure Of Section 189 Of The Atomic Energy Act Envision Court Of Appeals Review Of Final Orders Entered In "Proceedings" Where No Hearing Has Been Held

According to the court of appeals, it was precluded from taking jurisdiction over respondent's petition by "the clear-cut language of [Section 189]" (Pet. App. 10). That section, the court said, used the term "proceeding" to mean "formal 'proceedings' "—those in which "formal hearings" were held (*id.* at 11, 13). Because no hearing was held in this case under Section 189(a), there was no "proceeding" reviewable under Section 189(b). Only by reading the Act in that fashion, the court believed, could it avoid the anomaly of having the term " 'proceeding' * * * mean one thing for procedural purposes and another for jurisdictional purposes" (Pet. App. 11).

The language and structure of Section 189 do not support these conclusions. Section 189(a), which deals with the right to a hearing, plainly envisions "proceedings" in which no hearing is held. Section 189(b) makes these and other "proceedings" reviewable in the courts of appeals. The cases holding that

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orders, because of the change in administrative regulations making such decisions an integral part of the deportation proceedings conducted by a special inquiry officer, are now within the reach of § 106(a)'s judicial review provisions.

the Commission may dispose of some Section 2.206 requests without holding a hearing are consistent with this interpretation of the Act.

1. *Section 189(a) Does Not Require A Hearing To Be Held In Every Proceeding*

a. Section 189(a) does not, as the court of appeals believed, equate "proceeding" with agency action in which a hearing is held. On the contrary, it plainly presumes that there may be proceedings without any hearing. The first sentence of Section 189(a) states that "the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding * * *." That means that in some proceedings no hearing will be held because none is requested. It also means that in other proceedings no hearing will be held because the only request for one comes from a person who has no "interest [that] may be affected by the proceeding."

Even when a hearing is requested by an interested party, there are reasons why none may be held. An evidentiary hearing may be denied if the party fails to specify the basis for his request, *BPI* v. *AEC*, 502 F.2d 424 (D.C. Cir. 1974), or fails to raise an issue within the scope of the proceeding, *Bellotti* v. *NRC*, 725 F.2d 1380 (D.C. Cir. 1983). A licensing proceeding may also be concluded without a hearing when the contentions advanced present no genuine issue of material fact. 10 C.F.R. 2.749.

In still another class of cases the Commission may decline to hold a hearing because it concludes that it lacks jurisdiction. In *Natural Resources Defense Council, Inc.* v. *NRC*, *supra*, for example, the NRC held that it lacked licensing authority over certain waste-storage tanks to be built by the Energy Research and Development Administration. 606 F.2d at

1264-1266. In such a case it would make little sense for the NRC then to hold a hearing on whether the tanks would satisfy substantive license requirements (*e.g.*, whether they would threaten the public health and safety). Yet the court of appeals held that the Commission's order had been " 'entered in [a] proceeding' for 'the granting . . . of [a] license,' " and so was reviewable under Section 189(b), since "a licensing jurisdiction determination is a necessary first step in any proceeding for the granting of a license" (606 F.2d at 1265). But see *Union of Concerned Scientists* v. *NRC*, No. 82-2053 (D.C. Cir. May 25, 1984), slip op. 11.

In short, there are a variety of screening procedures by which a Section 189(a) proceeding may be concluded without a hearing. In this case the Director found that one of respondent's claims was moot, that there was no factual basis for the second, and that the third presented no substantial health or safety issue warranting further proceedings. He therefore declined to issue a Section 2.202 order, and terminated the proceeding short of a hearing.

This distinction between a "proceeding" (a term which describes the entire litigation process at the administrative level) and a "hearing" (one of the procedures to be followed in many such proceedings) is hardly unique. The very same distinction is drawn in the Administrative Orders Review Act (28 U.S.C. 2341 *et seq.*) (the Hobbs Act), to which Section 189(b) refers for judicial review of these cases. 28 U.S.C. 2349(a) states that "[t]he court of appeals has jurisdiction of the proceeding on the filing and service of a petition to review." Once it has jurisdiction, the court may take any number of actions "pending the final hearing and determination of the petition." 28 U.S.C. 2349(b). 28 U.S.C. 2346 states

that the "proceeding" may be "terminated on a motion to dismiss"—*i.e.*, prior to a "hearing" in the court of appeals. Cf. 28 U.S.C. 2345 ("prehearing conference"). Moreover, a final judgment in the "proceeding to review" is itself subject to further judicial review in this Court (28 U.S.C. 2350); and such a judgment may be entered, in response to a motion to dismiss (28 U.S.C. 2346), before a hearing is held in the court of appeals.

The Hobbs Act also uses the term "proceedings" to describe cases where no hearing has been held before the agency whose action is being reviewed. 28 U.S.C. 2347(b) (emphasis added) states that

> *When the agency has not held a hearing* before taking the action of which review is sought by the petition, the court of appeals shall determine whether a hearing is required by law. After that determination, the court shall—
>
> (1) *remand the proceedings* to the agency to hold a hearing, when a hearing is required by law;
>
> (2) *pass on the issues presented*, when a hearing is not required by law and it appears from the pleadings and affidavits filed by the parties that no genuine issue of material fact is presented * * *.

The independence of the terms "proceeding" and "hearing" is thus well recognized in other contexts. The court of appeals may nevertheless have believed that they were inseparable here because Section 189(a) states that "[i]n any proceeding * * * the Commission shall grant a hearing * * *." But the word "shall" is not intended to be absolute. The Seventh Amendment also states that "In Suits at common law * * * the right of trial by jury *shall* be

preserved" (emphasis added). But the constitutional right to a particular mode of trial does not preclude termination of "Suits at common law" before the jury is empanelled if the court concludes that the plaintiff has presented no genuine factual issue (Fed. R. Civ. P. 56(c)), or a bench trial if all parties waive a jury (Fed. R. Civ. P. 38(d)). Nor does the summary termination of the case, or trial without a jury, mean that it was not a "Suit at common law." Similarly, termination of a proceeding for license suspension without a hearing does not mean that the agency's action never ripened into the kind of "proceeding" specified in Section 189. It may only mean that there was no substantial health or safety issue to warrant going further, or that no hearing was requested.

b. This common sense understanding of when a "proceeding" begins, and what it entails, is the one adopted by the Second and Seventh Circuits.[10] Indeed, it was consistently adhered to within the District of Columbia Circuit prior to this case.[11] It has also been accepted in considered statements by the Third and Eighth Circuits, which have addressed the issue in the course of holding that district courts may not

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[10] *County of Rockland* v. *NRC*, 709 F.2d 766, 774 (2d Cir.) cert. denied, No. 83-329 (Nov. 28, 1983); *Rockford League of Women Voters* v. *NRC*, 679 F.2d 1218, 1219-1221 (7th Cir. 1982). See also *Illinois* v. *NRC*, 591 F.2d 12 (7th Cir. 1979) (accepting jurisdiction without considering the question); *City of West Chicago* v. *NRC*, 701 F.2d 632, 653 (7th Cir. 1983) (dictum).

[11] *Seacoast Anti-Pollution League* v. *NRC*, 690 F.2d 1025, 1027-1028 (D.C. Cir. 1982); *Natural Resources Defense Council, Inc.* v. *NRC*, 606 F.2d 1261 (D.C. Cir. 1979). See also *Porter County Chapter of the Izaak Walton League* v. *NRC*, 606 F.2d 1363 (D.C. Cir. 1979) (accepting jurisdiction without considering the question).

short-circuit the process of agency decision and appellate review.[12] Finally, it has been followed by every district court that has considered the problem.[13]

These cases have held that consideration of a Section 2.206 petition is—like the jurisdiction determination in *Natural Resources Defense Council, Inc.* v. *NRC*—a "necessary first step in th[e] proceeding" to suspend, revoke, or amend any license. *Rockford League of Women Voters* v. *NRC*, 679 F.2d 1218, 1221 (7th Cir. 1982); *County of Rockland* v. *NRC*, 709 F.2d 766, 774 (2d Cir.), cert. denied, No. 83-329 (Nov. 28, 1983). That first step may be followed by a show cause order, answer, hearing, and decision to suspend, revoke, or amend. But the process may also be terminated at an earlier stage. The fact that it is makes it no less a "proceeding" for purposes of judicial review.

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[12] *Simmons* v. *Arkansas Power & Light Co.*, 655 F.2d 131, 134 (8th Cir. 1981); *Susquehanna Valley Alliance* v. *Three Mile Island Nuclear Reactor*, 619 F.2d 231, 235-239 (3d Cir. 1980), cert. denied, 449 U.S. 1096 (1981). Justice Rehnquist, dissenting from the denial of certiorari in *Susquehanna Valley Alliance*, noted with apparent approval the court of appeals' "hold[ing] * * * that the Atomic Energy Act claims are reviewable exclusively in the Court of Appeals" (449 U.S. at 1099).

[13] *Desrosiers* v. *NRC*, 487 F. Supp. 71, 75 (E.D. Tenn. 1980) (dictum); *Paskavitch* v. *NRC*, 458 F. Supp. 216, 217 (D. Conn. 1978) (dictum); *Honicker* v. *Hendrie*, 465 F. Supp. 414, 418-419 (M.D. Tenn.), appeal dismissed, 605 F.2d 556 (6th Cir. 1979), cert. denied, 444 U.S. 1072 (1980). See *Sunflower Coalition* v. *NRC*, 534 F. Supp. 446, 448 (D. Colo. 1982). But cf. *Drake* v. *Detroit Edison Co.*, 443 F. Supp. 833 (W.D. Mich. 1978).

2. *Review Of This Case Under Section 189(b) Is Consistent With The Cases Dealing With The Right To A Hearing*

The court of appeals believed that taking jurisdiction here would be inconsistent with several cases holding that the NRC need not hold a hearing in passing on a Section 2.206 request, since that determination was not "a 'proceeding' under 42 U.S.C. § 2239 (a)" (Pet. App. 7). After all (*id.* at 11):

> the statutory language of 42 U.S.C. § 2239(b) explicitly restricts our reviewing jurisdiction to those final orders entered in the kinds of formal "proceedings" specified in 42 U.S.C. § 2239(a). This unusual, interlocking scheme does not allow "proceeding" to mean one thing for procedural purposes and another for jurisdictional purposes.

Contrary to the court's assumption, however, the interpretation we propose is entirely consistent with the principle underlying the cases dealing with the right to a hearing on Section 2.206 requests.

a. We begin by noting that the "interlocking scheme" created by Section 189 is not as sophisticated as the court of appeals imagined. Section 189(b) simply directs that the courts of appeals shall review "[a]ny final order entered in any proceeding of the kind specified in subsection (a)." The "kinds" of proceedings specified in Section 189(a) are those "for the granting, suspending, revoking, or amending of any license or construction permit."[14] Section 189(a) says nothing about "formal proceedings." Nor, as

[14] In addition, Section 189(a) mentions proceedings "for the issuance or modification of rules and regulations dealing with the activities of licensees, and * * * for the payment of compensation, an award or royalties under sections 2183, 2187, 2236(c) or 2238 of this title" (42 U.S.C. 2239(a)(1)).

we made clear above, does it require that a hearing occur in every proceeding to which it refers.

Several courts of appeals have held that the NRC need not hold a hearing whenever a Section 2.206 request is filed. See *Porter County Chapter of the Izaak Walton League* v. *NRC*, *supra*; *Illinois* v. *NRC*, *supra*. Those decisions support our contention that the language of Section 189(a) ("[i]n any proceeding * * * the Commission *shall* grant a hearing") is not to be read in an absolute fashion. See also *BPI* v. *AEC*, *supra*; *Bellotti* v. *NRC*, *supra*. They thus implement in this context the principle—generally accepted elsewhere in the law—that agencies have considerable discretion to set threshold requirements for hearings.[15] But, improvident dicta aside, their rationale has no effect on the choice of forum for review.

In *Porter County Chapter of the Izaak Walton League*, for example, the court rejected a claim (similar to respondent's) that the Commission was required to hold a permit revocation hearing because new evidence raised questions about the safety of a

[15] We note in this regard that the threshold for granting a Section 2.206 request and issuing a show cause order differs from that for granting a hearing in an initial licensing proceeding. In the latter case a person with the requisite standing need only advance a contention raising a genuine issue of material fact, while in the former case a person must raise a substantial health and safety concern warranting issuance of a show cause order. A mere dispute about factual issues is not sufficient to require granting a Section 2.206 petition. *In re Consolidated Edison Co. (Indian Point, Units 1, 2 & 3)*, 2 N.R.C. 173 (1975). This difference in the threshold for a hearing is due to the distinction between initial licensing, where all aspects of the application must be judged by the agency, and enforcement cases, where the agency has substantial discretion regarding whether to take action and ordinarily will not do so absent a showing that such action is warranted.

power reactor's containment vessel. The court noted the "wide discretion" that agencies have in fashioning their own rules of procedure, and concluded that Section 189(a) left the Commission free to "undertake preliminary inquiries in order to determine whether [a Section 2.206] claim is substantial enough under the statute to warrant full proceedings." 606 F.2d at 1369 & n.15. See also *Illinois* v. *NRC*, 591 F.2d at 15-16.

The problem addressed in *Porter County Chapter* is similar to the issue in *Costle* v. *Pacific Legal Foundation*, 445 U.S. 198 (1980). The Federal Water Pollution Control Act (33 U.S.C. 1342) requires an "opportunity for public hearing" before permits may be issued for the discharge of pollutants. The legislative history of that Act also reveals "a strong congressional desire that the public have input in decisions concerning the elimination of water pollution." 445 U.S. at 215. The EPA nevertheless promulgated regulations requiring parties who requested a hearing on a proposed pollutant discharge permit to show that material facts were in dispute. This Court sustained the regulations, noting that it had frequently upheld similar "agency rules * * * that have required an applicant who seeks a hearing to meet a threshold burden of tendering evidence suggesting the need for a hearing." 445 U.S. at 214. See also *National Independent Coal Operators' Ass'n* v. *Kleppe*, 423 U.S. 388, 397-398 (1976); *Weinberger* v. *Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 620 (1973); *Gulf States Utilities Co.* v. *FPC*, 411 U.S. 747, 762 (1973); *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192, 205 (1956).

Against that background it is easy to see that the Section 2.206 hearing cases ultimately do not rest on an interpretation of the word "proceeding" in

Section 189(a). Instead they stand for the more general principle that the NRC has authority to terminate such proceedings short of a hearing in the proper circumstances, including cases where issuance of a show cause order is not warranted. And if that is so, then confining judicial review of this case to the court of appeals creates no inconsistency between the "procedural" and "jurisdictional" provisions of the Act.

b. None of the possible objections to this analysis of the right-to-hearing cases is compelling. One such objection is that language in two of the cases suggests that no hearing is required because no Section 189 "proceeding" is begun by the mere filing of a Section 2.206 request. *Porter County Chapter of the Izaak Walton League* v. *NRC*, 606 F.2d at 1368; *Illinois* v. *NRC*, 591 F.2d at 14. But in neither case was that language necessary to the decision. Indeed, in *Illinois* v. *NRC* the question was not even disputed 591 F.2d at 14 n.3 (petitioner conceded that "there was no formal 'proceeding' in which [it] could intervene as of right"). Nor did either case consider the effect that such a conclusion would have on the right to direct review under Section 189(b).

The other possible objection to our analysis is that Section 2.206 (emphasis added) itself speaks of "a request * * * *to institute* a proceeding pursuant to § 2.202." And Section 2.202(a) (emphasis added) says that the Director "*institute*[*s*] a proceeding * * * by serving on the licensee an order to show cause." That language means that there is no opportunity for a hearing until the Director grants the request and issues a show cause order. 10 C.F.R. 2.202(b). But it also seems to say that the request itself does not "institute a proceeding," so that an order denying the request would not be reviewable in the court of appeals. Perhaps, then, the regulations

themselves support the court of appeals' conclusion—that the term "proceeding" has been given one meaning "for procedural purposes and another for jurisdictional purposes" (Pet. App. 11).

These linguistic difficulties dissolve, however, if one keeps in mind the realities of the process. We noted above that an order holding that the NRC had no jurisdiction over a license proceeding was nevertheless considered as an order entered in such a "proceeding" for purposes of direct review. See pages 13-14, *supra*. That is just an application in the agency context of the familiar rule that courts have jurisdiction to determine their own jurisdiction. See *United States* v. *United Mine Workers*, 330 U.S. 258, 290-295 (1947). If the decision is against jurisdiction, it can lead to interesting scholastic debates about whether there ever *was* a "proceeding" (or a "civil action[] arising under the Constitution, laws, or treaties of the United States" (28 U.S.C. 1331)). But the more pragmatic approach is to ignore that metaphysical question, and assume that decision of such preliminary issues is necessarily encompassed by the statutory term defining original or appellate jurisdiction.

The same can be said of orders denying Section 2.206 requests. In one sense, as the regulations show, such a request is a call upon the NRC to use its prosecutorial resources in an enforcement proceeding. And in that sense one could argue that, if the Commission denies the request, there never was a "proceeding." (It is certainly true that insisting on a hearing before the request is granted would put the cart before the horse, just as holding a trial before addressing the issue of jurisdiction inverts the natural order of things.) But the Commission has bound itself to act on such requests if they raise a "substantial health or safety issue." *In re Consolidated Edison Co.* (*Indian Point, Units 1, 2 & 3*), 2 N.R.C. 173, 176 (1975). And for purposes of reviewing orders issued under that standard, the more practical approach is to treat the NRC's decisions as necessarily encompassed by the statutory term.

This is surely consistent with the intent of Section 2.206. For whatever implications one might find in the language of the regulation, it was not intended as an administrative interpretation of the term "proceeding" in Section 189(b). The Commission has, after all, consistently taken the position that an order denying a Section 2.206 request is reviewable only in the courts of appeals. See cases cited at notes 10-13, *supra*.

B. The Legislative History Of Section 189 Supports Court Of Appeals Review In This Case

In *Natural Resources Defense Council, Inc.* v. *NRC*, 606 F.2d at 1265 n.11, the District of Columbia Circuit concluded that the interpretation of Section 189 which it now rejects "is fully consistent with [the legislative] history." We agree. The legislative history makes three points relevant to the issue in this case. First, it shows that Congress intended the courts of appeals to review all final orders entered by the Commission in proceedings that might affect licensees. Second, it demonstrates that review in the court of appeals was not keyed to a prior hearing before the Commission; in fact, the hearing and review provisions had independent origins, and were not combined in Section 189 until late in the legislative process. Third, in selecting the Hobbs Act to govern orders entered in license proceedings Congress consciously paralleled the FCC review system, which gives the courts of appeals exclusive jurisdiction to review orders like the one at issue here.

1. *Congress Intended The Courts Of Appeals To Review All NRC Orders Affecting Licensees, Whether Or Not A Hearing Was Held*

a. A major purpose of the Atomic Energy Act of 1954 was to permit the private exploitation of nuclear energy through an elaborate system of construction permits and operating licenses. S. Rep. 1699, 83d Cong., 2d Sess. 3, 8 (1954). The Act consolidated all the procedures concerning permits and licenses—applications, terms, revocation, modification—in chapter 16, the last provision of which is Section 189. Ch. 1073, §§ 181-189, 68 Stat. 953-956; see 42 U.S.C. (& Supp. V) 2231-2239. It is manifest from the very structure of the Act that insofar as the licensing process occasioned judicial review, Congress wished it to occur in the courts of appeals.

That was certainly the intention of the original bill proposed by the Joint Committee on Atomic Energy. H.R. 8862, 83d Cong., 2d Sess. §§ 188-189 (1954), *reprinted in* I AEC, *Legislative History of the Atomic Energy Act of 1954* (*Leg. Hist.*), at 166-168 (1955); Joint Comm. on Atomic Energy, 83d Cong., 2d Sess., *A Proposed Act to Amend the Atomic Energy Act of 1946*, at 37-38 (Joint Comm. Print Apr. 1954) (1 *Leg. Hist.* 97-98).[16] That bill established a special Review Board to "review, on petition, *any action* of the Commission *in connection with*" the grant, denial, revocation, or modification of a license or permit. H.R. 8862, § 188 (1 *Leg. Hist.* 166) (emphasis added).[17] The Board's decisions automatically

[16] A companion bill to H.R. 8862 was introduced in the Senate. S. 3323, 83d Cong., 2d Sess. (1954) (1 *Leg. Hist.* 181). (For the Court's convenience we will include citations to the *Legislative History*, where appropriate, in parentheses after the document referred to.)

[17] The Board was also empowered to review Commission action adopting or modifying regulations that affected certain licensees (including those who operated power plants), or determining "just compensation pursuant to the provisions of this Act." H.R. 8862, § 188 (1 *Leg. Hist.* 166); cf. note 14, *supra*.

became final orders of the Commission (*ibid.*). And Section 189 of the original bill then said that "[a]ny proceeding to enjoin, set aside, annul or suspend *any order* of the Commission shall be brought as provided by and in the manner prescribed in the [Hobbs Act]" (1 *Leg. Hist.* 167) (emphasis added)—*i.e.*, in the courts of appeals.

The Joint Committee then held hearings on the bill, in the course of which some doubt was expressed about the ability of the Review Board ("within the Commission" itself) to act impartially. *S. 3323 and H.R. 8862, To Amend the Atomic Energy Act of 1946: Hearings on S. 3323 and H.R. 8862 Before the Joint Comm. on Atomic Energy* (*AEA Hearings*), 83d Cong., 2d Sess. 290 (1954) (2 *Leg. Hist.* 1924). As a result the provision for a Board was eliminated, and Section 188 was collapsed into Section 189. Joint. Comm. on Atomic Energy, 83d Cong., 2d Sess., *Comm. Print* § 189 (May 21, 1954) (1 *Leg. Hist.* 335-336); H.R. 9757, 83d Cong., 2d Sess. § 189 (1954) (1 *Leg. Hist.* 631).[18] The new Section 189 made Commission actions directly reviewable in the courts of appeals, without any intermediate step. Review was limited, however, to:

[18] An identical substitute bill was reported favorably by the Joint Committee to the Senate and placed on the calendar. S. 3690, 83d Cong., 2d Sess. (1954) (1 *Leg. Hist.* 645); S. Rep. 1699, 83d Cong., 2d Sess. (1954) (1 *Leg. Hist.* 749); 100 Cong. Rec. 9260 (1954) (3 *Leg. Hist.* 3018).

> Any final order granting, denying, suspending, revoking, modifying or rescinding any license or construction permit * * *.[19]

No explanation was offered for this choice of language, which had the apparent effect of dropping—from the otherwise comprehensive review scheme—all final Commission orders (including those that terminated enforcement proceedings) that did not suspend, revoke, modify, or rescind a license.

The oversight was quickly remedied, however. Two weeks after the substitute bill was introduced, Senator Hickenlooper proposed an amendment giving the courts of appeals authority to review any final order entered by the Commission

> [*i*]*n any proceedings* * * * for the granting, suspending, revoking, or amending of any license or construction permit * * *.[20]

1 *Leg. Hist.* 1145 (emphasis added). As he explained, the change was designed "to clarify the intent of Congress with respect to the extent of the applicability of the [Hobbs Act.]" 100 Cong. Rec. 10686 (1954) (3 *Leg. Hist.* 3175). The bill passed the Senate and was enacted in essentially that form. 1 *Leg. Hist.* 37-38, 1342, 1450.

These changes made in the course of the bill's passage, seen against the background of chapter 16 of

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[19] The Review Board was also eliminated as a step to direct review in the courts of appeals of Commission orders "issuing or modifying rules and regulations dealing with the activities of licensees." H.R. 9757, § 189 (1 *Leg. Hist.* 631).

[20] The amendment also restored to the courts of appeals the review authority they had under the original bill (once the Review Board had acted) over final orders entered "in any proceeding for the payment of compensation, an award or royalties under Section 156, 186(c) or 188." 1 *Leg. Hist.* 1145. See note 17, *supra*.

the original Act (Sections 181-189), strongly suggest a congressional intent to give the courts of appeals exclusive authority to review all final Commission orders related to the licensing process. That is undeniably true where a license is issued or changed as a result of the proceedings. But as the language finally agreed on shows, it was also intended in cases where the proceedings are for some reason terminated short of such action. As we explain below (pages 34-42, *infra*), there are obvious reasons why that should be so.

b. The history of the Act also makes clear that the court of appeals' jurisdiction to review Commission orders does not depend on the holding of a hearing before the Commission. In fact, the original bill, which did provide for court of appeals review of "any order of the Commission" (H.R. 8862, § 189) (1 *Leg. Hist.* 167), did not even include the right to a hearing. That omission was the source of considerable concern, given the Commission's authority to revoke permits and licenses, to those who testified at the hearings on the bill. *AEA Hearings*, *supra*, at 65, 113-114, 152-153, 226-227, 328-329, 352-353, 400-401, 416-417 (2 *Leg. Hist.* 1699, 1747-1748, 1786-1787, 1860-1861, 1962-1963, 1986-1987, 2034-2035, 2050-2051). The problem was corrected in the substitute bill (H.R. 9757) by adding a new concluding sentence to Section 181 (1 *Leg. Hist.* 625):

> Upon application, the Commission shall grant a hearing to any party materially interested in any "agency action".

The difficulty with this provision was that it was "too broad, broader than it was intended to [be]." 100 Cong. Rec. 10686 (1954) (remarks of Sen. Pastore) (3 *Leg. Hist.* 3175). The right to a hearing had been added in response to concerns about the

licensing process; the obvious solution to the problem of overbreadth was to restrict the right to those proceedings. Senator Hickenlooper's amendment took that approach, moving the right to a hearing from Section 181 and making it a new subsection within Section 189 (1 *Leg. Hist.* 1145). The result was that the right to a hearing was confined to the same kinds of license proceedings for which judicial review was available. In Senator Pastore's words (100 Cong. Rec. 10686 (1954)) (3 *Leg. Hist.* 3175): "The amendment limits the provision to hearings on licenses in which a review shall take place."

It would be perverse, however, to turn that amendment into a limitation on the courts of appeals' reviewing authority. If there is any interdependence between the hearing and review provisions of Section 189, it actually works the other way around: the right to a hearing was made to depend (among other things) on the availability of subsequent review in the courts of appeals. That is quite a different thing from saying that review is only available if a hearing has been held.[21]

2. *Congress's Choice Of The Hobbs Act Indicates An Awareness That Orders Like The One Here Would Be Reviewed In The Courts Of Appeals*

As our discussion of the legislative history of the Atomic Energy Act makes clear, Congress was unwavering in its decision—made in the very first draft of the Act—to provide for review of Commission orders in licensing proceedings under the Hobbs Act.

[21] We note that although Congress amended Section 189 of the Atomic Energy Act in 1983, see note 2, *supra*, it did nothing to disturb the (at that time) consistent line of authority recognizing jurisdiction in the courts of appeals over Section 2.206 denials. See *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 733 (1975).

That decision is significant because the latter Act, passed only four years earlier, explicitly contemplated court of appeals review of agency orders (including orders in licensing proceedings) entered without a hearing.[22]

The choice of the Hobbs Act is particularly important because of the role that statute played in the judicial review scheme for orders of the Federal Communications Commission (FCC). There is considerable evidence that Congress, in setting up the system of construction permits and operating licenses under the Atomic Energy Act, consciously paralleled the FCC licensing system.[23] The FCC system, like the

[22] The Hobbs Act was enacted in 1950 after a long history. At the suggestion of Chief Justice Stone, the Judicial Conference established a committee in 1942 to study the advisability of replacing the review procedures of the Urgent Deficiencies Act with a more modern judicial review system. H.R. Rep. 2122, 81st Cong., 2d Sess. 2 (1950). The Urgent Deficiencies Act, passed in 1913, provided for review of certain orders of the Interstate Commerce Commission by specially constituted three-judge district courts, and provided for direct appeal as of right to the Supreme Court. 38 Stat. 220. In time, the Act was applied to certain orders of the Secretary of Agriculture under the Packers and Stockyards Act, 7 U.S.C. (1940 ed.) 217, the Maritime Commission under the Shipping Act of 1916, 46 U.S.C. (1940 ed.) 830, and the Federal Communications Commission under the Federal Communications Act of 1934, 47 U.S.C. (1940 ed.) 402(a).

Legislation transferring review to the regular courts of appeals and limiting Supreme Court review to certiorari was introduced in 1947, but failed to pass. H.R. Rep. 2122 at 3. In 1950 the Hobbs Act effected the desired changes for orders of the Secretary of Agriculture, the FCC, and the Maritime Commission. 64 Stat. 1129. Review of ICC orders under the three-judge district court system was not abolished until 1975. Pub. L. No. 93-584, 88 Stat. 1917.

[23] See *AEA Hearings* 117-118 (2 *Leg. Hist.* 1751-1752); Green, *The Law of Reactor Safety*, 12 Vand. L. Rev. 115, 122

Atomic Energy Act (42 U.S.C. 2236, 2237), includes provisions for the revocation and modification of licenses (47 U.S.C. 312, 316), and permits persons affected to request that the FCC take such action.[24] Before enactment of the Hobbs Act, denials of at least some such requests were reviewed de novo by a three-judge district court.[25] After the Act was passed, however, they were reviewable in the courts of appeals, even where no hearing had been held in connection with the denial.

The Hobbs Act was expressly designed to accommodate review of agency orders like the one at issue here. Section 7(b) (28 U.S.C. 2347(b); see page

(1958); H. Marks & G. Trowbridge, *Framework for Atomic Industry: A Commentary on the Atomic Energy Act of 1954*, at 77 (1955).

[24] See, *e.g.*, *Tomah-Mauston Broadcasting Co.* v. *FCC*, 306 F.2d 811 (D.C. Cir. 1962); *CBS* v. *FCC*, 211 F.2d 644, 646-647 (D.C. Cir. 1954); *Radio Station WOW, Inc.* v. *FCC*, 184 F.2d 257, 258-259 (D.C. Cir. 1950). Cf. *Columbus Broadcasting Coalition* v. *FCC*, 505 F.2d 320, 322-324 (D.C. Cir. 1974).

[25] 47 U.S.C. (Supp. V 1951) 402(a); *CBS* v. *FCC*, 211 F.2d at 647; *Radio Station WOW, Inc.* v. *FCC*, 184 F.2d at 259-260. Cf. *Providing for the Review of Orders of Certain Agencies, and Incorporating into the Judicial Code Certain Statutes Relating to Three-Judge District Courts: Hearings on H.R. 1468, H.R. 1470, and H.R. 2271 Before Subcomm. No. 3 and Subcomm. No. 4 of the House Comm. on the Judiciary (Hobbs Act Hearings)*, 81st Cong., 1st Sess. 71 (1949). See also *Hubbard Broadcasting, Inc.* v. *FCC*, 684 F.2d 594 (8th Cir. 1982), cert. denied, No. 82-772 (Feb. 22, 1983) (dismissal of petition for rulemaking); *Hobbs Act Hearings* 71 (same).

The proper path for judicial review was not crystal clear. But those cases that were not reviewable in a three-judge district court could be taken directly to the Court of Appeals for the District of Columbia Circuit. 47 U.S.C. (1946 ed.) 402(b); *Hobbs Act Hearings* 71-72; cf. *Tomah-Mauston Broadcasting Co.* v. *FCC*, 306 F.2d at 812-813.

15, *supra*) provides that "[w]hen the agency has not held a hearing * * * the court of appeals shall * * * pass on the issues presented, when a hearing is not required by law and * * * no genuine issue of material fact is presented[.]" On the other hand, when a hearing is required by law (*ibid.*), or when a party wishes to adduce additional evidence (28 U.S.C. 2347(c)), the Act provides for a remand of the proceedings to the agency.[26] The very point of that section was to assure court of appeals review of all orders entered by agencies such as the FCC. As Judge Phillips, chairman of the Judicial Conference Committee that drafted the Act, testified (*Hobbs Act Hearings*, *supra* note 25, at 30):

> After further study, the representatives of the * * * Communications Commission believed that we could go a little further * * *, and we concluded that we could include certain orders made by those administrative agencies without a hearing.

See also *id.* at 72.

The operation of these provisions is illustrated by *FCC* v. *ITT World Communications, Inc.*, No. 83-371 (Apr. 30, 1984). There the FCC denied ITT's petition for rulemaking about the Commission's authority to participate in international discussions of new carriers and services.[27] In denying the petition the

[26] When the statute governing the agency's procedure does not require the holding of a hearing, but a genuine issue of material fact is presented, the Act provides for transfer of the proceedings to the district court. 28 U.S.C. 2347(b)(3). This provision is seldom used. For a rare example, see *Lake Carriers' Ass'n* v. *United States*, 414 F.2d 567 (6th Cir. 1969).

[27] Although the case involved the denial of a petition for rulemaking rather than the denial of a request for license revocation, the difference is not significant for purposes of the

FCC received comments and reply comments, but did not hold a hearing. *In re ITT World Communications, Inc.*, 77 F.C.C.2d 877, 879-882 (1980). This Court nevertheless held that (slip op. 4-5):

> Exclusive jurisdiction for review of final FCC orders, such as the FCC's denial of respondents' rulemaking petition, lies in the Court of Appeals. 28 U.S.C. § 2342(1); 47 U.S.C. § 402(a). Litigants may not evade these provisions by requesting the District Court to enjoin action that is the outcome of the agency's order. * * *
>
> * * * Respondents contend that * * * the record developed upon consideration of the rulemaking petition by the agency does not enable the Court of Appeals fairly to evaluate their *ultra vires* claim. If, however, the Court of Appeals finds that the administrative record is inadequate, it may remand to the agency, * * * or in some circumstances refer the case to a special master, see 28 U.S.C. 2347(b)(3).

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issue here. Section 189 of the Atomic Energy Act deals with review of final orders entered in "any proceeding * * * for the granting, suspending, revoking, or amending of any license or construction permit, * * * and * * * any proceeding for the issuance or modification of rules and regulations dealing with the activities of licensees" (42 U.S.C. 2239). Since the court here restricted court of appeals review to orders entered in "formal 'proceedings'" (Pet. App. 11), denial of a rulemaking petition without a hearing would—like this case—go in the first instance to the district court.

The differences between denial of a petition for rulemaking and denial of a request for license revocation are no more significant for purposes of discerning Congress's intent about the appropriate forum for review. Section 189 treats both kinds of orders alike. And if Congress intended that FCC denials of rulemaking petitions be reviewed in the courts of appeals (even where no hearing was held), it is safe to assume that it envisioned similar treatment for similar NRC orders when it said that they too were to be governed by the Hobbs Act.

The legislative record of the Hobbs Act also explains the reasons for favoring court of appeals review, in terms that apply with equal force to this case. The pattern for such review, Congress noted, had been

> established for * * * orders of the Federal Trade Commission in 1914 (15 U.S.C. 45c) and followed by other laws since then in relation to many other agencies, including the Securities and Exchange Commission, the Bituminous Coal Commission, and the National Labor Relations Board. It is the more modern method and is generally considered to be the best method for the review of orders of administrative agencies.

H.R. Rep. 2122, 81st Cong., 2d Sess. 4 (1950).

The approach chosen was seen as far more efficient than the method then in use—review by a three-judge district court with trial de novo. See note 22, *supra*; S. Rep. 2618, 81st Cong., 2d Sess. 3 (1950). In part that was because "three-judge courts are not well adapted for conducting hearings." H.R. Rep. 2122 at 4. More important, however, Congress recognized that "the submission of the cases upon the records made before the administrative agencies will avoid the making of two records, one before the agency and one before the court, and thus going over the same ground twice" (*ibid.*). The possibility that "a suitable hearing [might] not [have been] held prior to initiation of the proceeding in the court of appeals" did not warrant departure from the new statutory scheme. Instead, the Act included "provisions in section 7(b) and (c) for the taking of evidence either by the agency or in the district court [see note 26, *supra*]" in such cases.

C. Compelling Practical Considerations Support The Interpretation Of Section 189 Rejected By The Court Of Appeals

The court below recognized (Pet. App. 11-12) that its decision was contrary to the widely held view that court of appeals review is the most efficient and practical route for most administrative orders. It concluded, nevertheless, that the plain language of the statute prevented it from weighing such considerations in reaching its decision (*ibid.*). What we have said up to this point demonstrates that both the language and the legislative history of Section 189 are consistent with an interpretation that permits review in the courts of appeals. It is thus appropriate to weigh the relative practicalities of the alternatives. See *Crown Simpson Pulp Co.* v. *Costle*, 445 U.S. 193, 197 (1980). As we now show, those considerations strongly support the interpretation we urge, for as Professor Davis has noted, it is a "highly practical" one. 4 K. Davis, *Administrative Law Treatise* § 23.5, at 140 (1983).

1. *The Court Of Appeals' Construction Will Lead To Bifurcated Or Serial Review Of NRC Orders In License Proceedings*

The court of appeals' holding has the anomalous result of making the proper forum for review depend on whether a Section 2.206 request is granted or denied. In the latter case (the situation here) review must proceed first to the district court. In the former case review would occur in the court of appeals, since a hearing would ordinarily be held. See 10 C.F.R. 2.202.[28] One may justifiably doubt that Congress contemplated such an unusual division of jurisdiction when it enacted Section 189. That allocation of authority is not just peculiar, though. It has quite undesirable practical consequences.

[28] Even after a hearing is held the NRC may decide to take no action against the licensee. In that event one has the rather capricious result that similar decisions (to take no action affecting a license) by the same body are reviewable in different courts, depending on the stage of the proceedings at which a decision is rendered.

a. One consequence of parsing jurisdiction in that way is that it leads to bifurcated review when the Section 2.206 denial is closely related to another NRC order reviewable in the court of appeals. A good example is provided by *Rodriguez* v. *NRC*, dismissed, No. 83-1805 (D.C. Cir. May 25, 1984). There the failure of the licensee's circuit-trip breaker required a reactor to be manually shut down. On April 12, 1983 Rodriguez filed a Section 2.206 request, seeking to have the NRC keep the reactor shut down until the licensee had properly analyzed the causes of the circuit breaker failure. On April 28, 1983 the licensee submitted to the NRC a program for corrective action. On April 29, 1983 the Director of the Office of Nuclear Reactor Regulation denied petitioner's Section 2.206 request, concluding that the licensee's proposed program adequately resolved any concerns. And on May 6, 1983 the NRC issued an immediately effective license amendment, requiring the licensee to implement the program proposed on April 28. Rodriguez then sought review in the court of appeals of: (i) the order denying his Section 2.206 request, and (ii) the order directing an immediately effective license amendment. Under the jurisdictional scheme created by the decision in this case, (i) was reviewable in the district court, while (ii) went to the court of appeals.[29] See also *Rockford League of Women*

[29] A February 9, 1984 order issued by the court in *Rodriguez* actually makes the matter more confusing still. The challenge

Voters v. *NRC*, 679 F.2d at 1219; *Seacoast Anti-Pollution League* v. *NRC*, 690 F.2d at 1027; 48 Fed. Reg. 4589 (1983).

That bifurcation of review is similar to the problem addressed by this Court in *Foti* v. *INS*, 375 U.S. 217 (1963). The issue in *Foti* was whether the Attorney General's refusal to suspend deportation was reviewable in the court of appeals under the Hobbs Act. "Although deportability and whether to grant a suspension are determined in the same hearing, the [court of appeals'] decision [in that case] mean[t] that an alien [could] appeal only the deportability finding to a Court of Appeals and [had] initially [to] seek review of a denial of suspension in a District Court" (375 U.S. at 226). This Court held that "[b]ifurcation of judicial review of deportation proceedings is not only inconvenient; it is clearly undesirable and not the necessary result from a fair interpretation of the pertinent statutory language" (*id.* at 232). See also *Crown Simpson Pulp Co.* v. *Costle*, 445 U.S. 193, 197 (1980) ("Absent far clearer expression of congressional intent, we are unwilling to read the Act as creating such a seemingly

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to the license amendment was dismissed as untimely, and the petition for review of the denial of the Section 2.206 request was dismissed with a citation to this case. The court of appeals went on to hold, however, that "the issue of whether the petition may properly be regarded as a request for public hearing, in a pending license modification proceeding, under 42 U.S.C. § 2239(a) must be considered" in the court of appeals. The lesson seems to be that when a Section 2.206 request is denied, that order may itself be reviewed simultaneously in the district court and the court of appeals if the petition for review is phrased artfully enough. We have reproduced the February 9, 1984 *Rodriguez* order at App., *infra*, 1a-2a.

A joint motion to dismiss was filed in *Rodriguez* on May 18, 1984, and granted by the court of appeals on May 25, 1984.

irrational bifurcated system."); *Investment Company Institute* v. *Board of Governors*, 551 F.2d 1270, 1276 (D.C. Cir. 1977); *Environmental Defense Fund, Inc.* v. *Hardin*, 428 F.2d 1093, 1098-1099 (D.C. Cir. 1970); Currie & Goodman, *Judicial Review of Federal Administrative Action: Quest for the Optimum Forum*, 75 Colum. L. Rev. 1, 60 (1976) (Currie & Goodman); L. Jaffe, *Judicial Control of Administrative Action* 158-159, 422 (1965) (Jaffe).

b. Even if there were no risk of simultaneous district and appellate court review, there is little to be gained in these cases from serial review by two tiers of courts. As Judge Posner noted in *Rockford League of Women Voters* v. *NRC*, 679 F.2d at 1221: "This in turn implies five tiers of potential judicial or quasi-judicial review of the petitioner's request * * *: by the Director of Nuclear Reactor Regulation, by the full Commission, by the district court, by the court of appeals, and by the Supreme Court. This is too much."

Such protracted proceedings cause delay. "The most obvious advantage of direct review by a court of appeals is the time saved compared to review by a district court, followed by a second round on appeal." *Harrison* v. *PPG Industries, Inc.*, 446 U.S. 578, 593 (1980); *Foti* v. *INS*, 375 U.S. at 226; Currie & Goodman, 75 Colum. L. Rev. at 16; Note, *The Forum for Judicial Review of Administrative Action: Interpreting Special Review Statutes*, 63 B.U. L. Rev. 765, 793 (1983) (Note). As the Administrative Conference has said, "direct review by the courts of appeals, where feasible, is generally desirable in the interest of efficiency and economy, as respects both litigants and the judicial system." 1 C.F.R. 305.75-3(g). This is particularly true in the context of nuclear power reactor licensing. See *Quivira Mining Com-*

pany v. *EPA*, 728 F.2d 477, 482 (10th Cir. 1984). It is an acknowledged fact that the unavoidable costs of delay prior to reactor construction and in interrupted operation—to which multiple layers of review inevitably contribute—have reached astonishing proportions. See *Union of Concerned Scientists* v. *NRC*, No. 82-2053 (D.C. Cir. May 25, 1984), slip op. 9 n.6 (MacKinnon, J., dissenting). Prolonging the review process for decisions in enforcement proceedings will only exacerbate the effect on licensees and recipients of construction permits.[30]

Serial review in this context is not only time-consuming, but also redundant. There is no need in the case of Section 2.206 denials for the kind of fact-sifting and issue-clarification that district courts can usefully undertake in other contexts. The reviewing court here will have before it a record of 547 pages, along with the decision of the Director of Nuclear Reactor Regulation explaining the reasons for the denial (Pet. App. 16-25). The NRC's regulations assure that such an explanation will be available in every case. 10 C.F.R. 2.206.[31] There may also be a

[30] We recognize that orders denying Section 2.206 requests, because they in essence decline to pursue enforcement action, do not in themselves contribute to the problem of delay. Nor would the process of review do so unless at some point the order was overturned. But as we note below, page 40, one of the drawbacks of district court review is the higher probability of an incorrect decision doing just that, rendered by "a district court with little knowledge of an agency's work [that is] required to handle an odd case." Jaffe, *supra*, at 159. Moreover, it cannot be ignored that the pendency of litigation itself—because an unfavorable outcome portends costs of compliance—has an impact on the cost of operation and a utility's ability to finance construction.

[31] Moreover, as we pointed out above (page 4 & note 4), the Commission will typically publish notice that a request has been received; and comments submitted in response to the notice become part of the record on review.

similar decision by the full Commission. 10 C.F.R. 2.206(a).[32]

The issues on judicial review of such decisions are whether the refusal to issue a show cause order was arbitrary and capricious, and whether the record shows "'a consideration of the relevant factors.'" *Seacoast Anti-Pollution League* v. *NRC*, 690 F.2d at 1030-1031 (quoting *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 416 (1971)). In resolving those questions the court of appeals will derive little benefit from the prior efforts of a district court. On the contrary, it will simply

> render an independent decision on the basis of the same administrative record as that before the district court; the identical standard of review is employed at both levels; and once appealed, the district court decision is accorded no particular deference.

First National Bank v. *Smith*, 508 F.2d 1371, 1374 (8th Cir. 1974), cert. denied, 421 U.S. 930 (1975); *Amusement & Music Operators Ass'n* v. *Copyright Royalty Tribunal*, 636 F.2d 531, 534 (D.C. Cir. 1980).

[32] Recent decisions by this Court have made clear, in any event, that the informality of agency action is not in itself a sufficient reason for eschewing court of appeals review. See, *e.g.*, *FCC* v. *ITT World Communications, Inc.*, slip op. 4-5; *Harrison* v. *PPG Industries, Inc.*, 446 U.S. at 583, 592-594. That is largely because the Hobbs Act provides a mechanism for supplementing the record where it is deficient, by remanding the case to the agency. 28 U.S.C. 2347(b)(1) and (c).

2. *Review Under The Hobbs Act Better Respects The Different Competencies Of The District Courts And The Courts Of Appeals*

As we have already noted (page 38), district courts are functionally better equipped than the courts of appeals to perform the tasks of fact-finding and issue-clarification. The nature of the agency action being reviewed here, however, makes no special demand for those abilities. On the contrary, expenditure of district court resources is unusually inefficient in cases like this, which involve complex regulatory statutes and administrative schemes with which the courts of appeals are much more familiar. If the decision in this case is affirmed, "a district court with little knowledge of [the] agency's work will be required to handle an odd case" from time to time. Jaffe, *supra*, at 159. The court of appeals, on the other hand, have developed a reservoir of experience in this area because litigation involving NRC license orders and rulemaking proceedings—under the terms of Section 189—typically bypass the district courts. Direct review takes advantage of this expertise and contributes to uniformity of decisions. For this reason the Administrative Conference has recommended that even "[i]nformal orders issued by agencies that mainly engage in formal adjudication and the formal orders of which are * * * subject by statute to direct review by the courts of appeals * * * should * * * be reviewable by the courts of appeals." 1 C.F.R. 305.75-3 recommendation 6(b)(iii). See also Note, 63 B.U.L. Rev. at 792-793; Currie & Goodman, 75 Colum. L. Rev. at 12.

Nor does resolution of these issues call for any of the other distinctive contributions that district courts make to the judicial process. One service performed by multiple tiers of review (claims under the Social

Security Act are a prominent example) is that the district courts play a "vital screening role * * * in holding down the volume of appellate litigation * * *." Currie & Goodman, 75 Colum. L. Rev. at 6. By contrast, "[t]he court[s] of appeals [are] the appropriate reviewing forum for [even] informal actions that * * * [a]re either few in number or, if numerous, would in most cases be likely to reach the appellate courts eventually" (1 C.F.R. 305.75-3 recommendation 6(b)(iii)).

As we noted in our petition (Pet. 15-16 & n.12), although Section 2.206 requests have historically been numerous, petitions for judicial review of denials have not been. Between 1974 and 1984 the NRC received 204 Section 2.206 requests. In only eight of those was judicial review sought after the request was denied. While there are indications that petitions for review may be filed more frequently in the future (see Pet. 16 n.12), such litigation does not portend any unmanageable burden for the courts of appeals.

Still another advantage of district court review is the convenience of venue. In proceedings under the Social Security Act—*e.g.*, for review of adverse administrative decisions on disability—the plaintiff has the right to a forum in the judicial district where he resides. 42 U.S.C. (Supp. V) 405(g). In such situations "[t]he obvious theory of a district court venue is that the typical plaintiff is a person of modest means." Jaffe 158. Here, however, there is no basis for presuming as a general matter that petitioners will fit that description.

This review of practical considerations only confirms what the court of appeals recognized—that this is a case where direct review in the court of appeals should be heavily favored. Since there is no merit to the court's conclusion that the statutory language

barred achievement of the result that practicality and good sense dictate, there is no reason to forego the benefits of direct review.

CONCLUSION

The judgment of the court of appeals should be reversed and the case remanded for disposition on the merits.

Respectfully submitted.

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JUNE 1984

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 83-1805

September Term, 1983

JOSEPH H. RODRIGUEZ
Public Advocate of the State of New Jersey,
PETITIONER

v.

UNITED STATES NUCLEAR REGULATORY COMMISSION AND UNITED STATES OF AMERICA,
RESPONDENTS

PUBLIC SERVICE ELECTRIC & GAS COMPANY,
INTERVENOR

[Filed Feb. 9, 1984]

BEFORE: Robinson, Chief Judge; Wald and Scalia, Circuit Judges.

ORDER

Upon consideration of this Court's order to show cause dated August 23, 1983 and the responses received, it is

ORDERED by the Court that:

1. The order to show cause is discharged.

2. That portion of the petition for review related to the Order Modifying License Effective Immediately dated May 6, 1983 is dismissed as untimely filed. 28 U.S.C. § 2344.

3. That portion of the petition for review related to the denial of petition under 10 C.F.R. § 2.206, being timely filed, may proceed to argument. Although such petition, insofar as it constitutes a petition for enforcement action, is not appealable here, *Lorion v. NRC*, 712 F.2d 1472 (D.C. Cir. 1983), the issue of whether the petition may properly be regarded as a request for public hearing, in a pending license modification proceeding, under 42 U.S.C. § 2239(a) must be considered.

4. Petitioner's brief shall be due 40 days from the entry of this order.

5. Respondent's brief shall be due 30 days thereafter.

The Clerk shall include this case in the pool of cases available to be drawn for this Court's September, 1984 sitting period.

Per Curiam
For The Court

GEORGE A. FISHER
Clerk

By: /s/ Daniel M. Cathey
DANIEL M. CATHEY
First Deputy Clerk

Chief Judge Robinson did not participate in this order.

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Nos. 83-703 and 83-1031

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

FLORIDA POWER & LIGHT COMPANY,
Petitioner,

v.

JOETTE LORION, *Etc., et al.,*
Respondents.

UNITED STATES NUCLEAR REGULATORY COMMISSION
and THE UNITED STATES OF AMERICA,
Petitioners,

v.

JOETTE LORION, *et al.,*
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR RESPONDENT JOETTE LORION, d/b/a CENTER FOR NUCLEAR RESPONSIBILITY

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QUESTION PRESENTED

Whether a Nuclear Regulatory Commission director's decision made through the ex parte agency process authorized by 10 C.F.R. § 2.206 constitutes a final order entered in a "proceeding" of the kind Congress specified in Section 189 of the Atomic Energy Act of 1954 as appropriate for initial review by the courts of appeals?

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and UNITED STATES OF AMERICA,
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for the District of Columbia Circuit

BRIEF FOR RESPONDENT JOETTE LORION, d/b/a CENTER FOR NUCLEAR RESPONSIBILITY

STATEMENT OF THE CASE

> There is a high, increasing likelihood that someday soon, during a seemingly minor malfunction at any of a dozen or more nuclear power plants around the United States, the steel vessel that houses the radioactive core is going to crack like a piece of glass. The result will be a core meltdown, the most serious kind of nuclear accident. . . .

D. L. Basdekas, Reactor Safety Engineer, Nuclear Regulatory Commission.[1]

1. The Nature of the Case and the Issues Presented.

a. The Turkey Point nuclear power plant has one of the most severely embrittled reactor vessels in the United States. For that reason, it is one of the reactors whose pressure vessel is most likely to crack from thermal shock if a minor malfunction requires the use of

1. D. L. Basdekas, "The Risk of a Meltdown," N.Y. Times (Mar. 29, 1982); see also NRC Staff Seeks Additional Information on Pressure Vessel Thermal Shock, Release No. II-81-79 (NRC Office of Public Affairs, Reg. II, Aug. 26, 1981).

standard emergency cooling procedures. A "seemingly minor malfunction" would thus result in the most serious kind of nuclear accident, a meltdown of the radioactive core.

Joette Lorion lives near the Turkey Point plant. When the staff of the Nuclear Regulatory Commission ("NRC" or "Commission") publicly disclosed these facts in 1981, Ms. Lorion asked the Commission to address the problem and, if necessary, suspend the reactor's operating license. That request was promptly denied by a subordinate NRC official in an agency process that relied solely upon ex parte submissions from the plant's owner-licensee and the NRC staff and that excluded Ms. Lorion from any participation.

A case that arose out of a citizen's concerns over a potential nuclear nightmare that threatened her and her neighbors

has become a potential jurisdictional nightmare that threatens all concerned. For almost three years, while the Turkey Point reactor has continued to operate at full capacity housed in an increasingly embrittled pressure vessel, Ms. Lorion has sought a meaningful opportunity to present and have the facts underlying her concerns addressed and resolved. In its effort to justify her exclusion from its decision-making process, the Commission argued that its ex parte agency process was not a "proceeding" of the kind Congress specified in section 189 of the Atomic Energy Act of 1954, 42 U.S.C. § 2239 (1982). In its efforts to restrict judicial review of its decision to the ex parte record submitted by the licensee and the NRC staff, the Commission argues that its ex parte agency process was a "proceeding" of

the kind Congress specified in section 189 of the Atomic Energy Act of 1954.

The Court of Appeals recognized the untenable paradox and resolved it in a manner that respected both the Commission's prerogatives in defining the agency processes appropriate for its own action and Congress's prerogatives in defining the jurisdiction of the courts. Respondent believes the Court of Appeals was correct. She also believes, however, that neither that court nor petitioners here have adequately identified the practical issue that this case presents or analyzed the jurisdictional nightmare that would result if petitioners' contentions here were accepted.

b. The practical issue in this case is not whether administrative decisions such as the one involved in this case should be reviewed in the district

courts; rather the issue is whether they should be screened by the courts of appeal before they get to the district courts. Under the Administrative Orders Review Act (the "Hobbs Act"), 28 U.S.C. §§ 2341 et seq. (1982), the courts of appeals cannot remand a case to the agency and instruct it to hold a hearing or to supplement the record unless the case is one in which the agency process under review constituted "proceedings [in which] a hearing is required by law," id. § 2347(b)(1). They must transfer to the appropriate district court any case that requires review of an agency action for which "a hearing is not required by law and [in which] a genuine issue of material fact is presented," 28 U.S.C. § 2347(b)(3).[2]

2. If there are no genuine issues of material fact and if the court of appeals has jurisdiction, it may, of course, pass upon the merits of the issues presented. 28 U.S.C. § 2347(b)(2).

The Commission and the courts of appeals have consistently held that NRC directors' decisions under 10 C.F.R. § 2.206 are not the product of a 'proceeding', but rather that they constitute ex parte factual determinations for which a hearing is not required by law.[3] As the record here suggests, persons sufficiently aggrieved to seek review of a director's refusal to act will frequently be able to demonstrate that there are genuine issues of material fact and thus that transfer to the appropriate district court is required under the Hobbs Act.

Thus the practical question here is whether section 189 of the Atomic Energy Act of 1954, 42 U.S.C. § 2239 (1982), requires that the courts of appeals screen

3. See, e.g., Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear 1), 7 N.R.C. 429, 432-33 (1978), aff'd sub nom., Porter County Chapter of the Izaak Walton League v. NRC, 606 F.2d 1363 (D.C. Cir. 1979).

petitions for review from directors' decisions refusing requests to institute licensing proceedings even though a significant proportion of those petitions will have to be transferred to the district courts. Respondent believes that the Court of Appeals correctly applied the plain meaning of that section in determining that, absent further action by Congress, both the initial screening and the required fact-resolution functions should be done by the district courts.

2. The Statutory and Regulatory Framework

a. The Atomic Energy Act of 1954 ("the Act"), as amended, 42 U.S.C. §§ 2011 et seq. (1982), established the statutory framework for the commercial development and regulation of nuclear power. Under the Act, the Commission was assigned regulatory responsibility and authorized and required to adopt rules and regula-

tions and to conduct proceedings for the licensing of nuclear power plants, 42 U.S.C. §§ 2201, 2231-42. Except as otherwise specified in the Act itself, the Commission's rulemaking and licensing proceedings were to be conducted in accordance with the framework established by the Administrative Procedure Act (the "APA"), 5 U.S.C. §§ 551-59 (1982). 42 U.S.C. § 2231.

In subsection 189(a) of the Act, Congress identified and made specific provision for three kinds of proceedings:

> . . . proceedings . . . for the granting, suspending, revoking, or amending of any license . . ., for the issuance or modification of rules and regulations dealing with the activities of licensees, and . . . for the payment of compensation [for mandatory patent licenses or other actions constituting a "taking"]

42 U.S.C. 2239(a)(1). Congress required that for these kinds of proceedings "the Commission shall grant a hearing upon the

request of any person whose interests may be affected and shall admit any such person as a party to such proceedings" and specified that appropriate prior notice of proceedings with respect to licenses be published in the Federal Register (id.).[4]

Pursuant to that mandate, the Commission has adopted a comprehensive set of rules specifying the procedures to be followed in its licensing and rulemaking proceedings. See 10 C.F.R. Part 2. As

4. Congress specified that no hearing need be held in post-construction licensing proceedings if none were requested. In 1983, Congress further amended section 189(a) to authorize the Commission to issue license amendments without notice and hearing if it had determined that the amendment "involves no significant safety hazards consideration." [Pub. L. No. 97-415, § 12, 45 Stat. 2067 (1981).] The question whether the agency process by which the Commission makes a "no significant safety hazards" determination constitutes a "proceeding of the kind specified" in section 189(a) is not before the Court in this case and should be avoided because the concern it raises differ in significant respects.

required by the Act and by the APA, these proceedings have two characteristics in common. Interested parties must be given adequate notice and, upon demand, a proper opportunity to submit their factual and legal contentions and to proffer evidence relevant to any material issues of fact. In addition, the Commission's rules for licensing proceedings incorporate the traditional safeguards for administrative adjudications (10 C.F.R. §§ 2.100-2.790), including the prohibition against ex parte communications between the decisionmaker and the Commission staff or any other party to the proceeding (10 C.F.R. § 2.780).

These rules assure that the final order in a contested proceeding of either kind will be based upon a record that includes the factual and legal contentions of interested persons. Even if the

Commission determines that there are no genuine issues of material fact, the rules assure the record will include such evidence as those who may be aggrieved by the final order properly proffered. Final orders in proceedings such as those must be based upon a record that is limited to materials that the parties to the proceedings had an opportunity to confront.

Congress determined that appeals from proceedings such as those should be subject to judicial review in the courts of appeals. Specifically, Congress provided in subsection 189(b) of the Act:

> Any final order entered in any proceedings of the kind specified in subsection (a) of this section [189] shall be subject to judicial review in the manner prescribed in [the Hobbs Act, 28 U.S.C. §§ 2341-51] and to the provisions of [the APA, 5 U.S.C. §§ 701-06].

42 U.S.C. § 2239(b).

b. By its rules, the Commission has assigned the power to "initiate a proceeding to modify, suspend or revoke a license" to the directors of the agency's various offices (10 C.F.R. § 2.202). Once such a proceeding has been initiated, the appropriate director and his staff prosecute the action on behalf of the commission and the respondent licensee (and the intervenors, if any) prosecute their respective contentions as parties to the proceedings. The customary procedures for contested licensing adjudications within the Commission must be followed (10 C.F.R. § 2.700), including the prohibitions against ex parte communications or submissions from the staff or any other party to the proceeding to the officials charged with adjudicative responsibility (10 C.F.R. § 2.780).

c. In 1974, twenty years after the Act was adopted and long after the Commission's basic procedural structure had been established, the Commission adopted Rule 2.206, 10 C.F.R. § 2.206.[5] That rule codified a procedure by which a person could request that the director of the appropriate office "institute a proceeding . . . to modify, suspend or revoke a license . . . ." 10 C.F.R. § 2.206(a). The rule does not require that a notice of the request be published and typically the director makes a decision based upon factual materials submitted by the licensee and the staff without further input by the person who made the request.[6] If the director denies the request, he then must advise the party making the request

5. 39 Fed. Reg. 12353 (Apr. 5,1974).

6. See, e.g., Northern Indiana Public Service Co., supra n. 1, 7 N.R.C. 429, 432-33 (for confirmation of authority and description of process).

"that no proceeding will be instituted", id., § 2.206(c). The rule prohibits any appeal from that decision, id., § 2.206(e).

The narrow issue before this Court is whether a director's decision not to institute a proceeding reached through the agency process established by 10 C.F.R. § 2.206 should be construed to be a "final order entered" in a "proceeding of the kind specified" in section 189(a) so as to require that petitions for review be initially screened by a court of appeals to determine whether transfer to a district court is necessary. The director's application of 10 C.F.R. § 2.206 in this case illustrates the concerns that led the Court of Appeals to determine that such a construction was inconsistent with the intended function as well as the statutory language of section 189 and with proper exercise of the judicial review function.

3. NRC Process and Decision

a. In 1981, the NRC identified an unanticipated and serious problem. Radioactive bombardment of a copper alloy used in the weldings in early reactor containment vessels had caused the vessels to embrittle more rapidly than anticipated. That embrittlement created an unanticipated and unevaluated risk that a containment vessel might crack as a result of thermal shock if standard emergency cooling procedures were required to shut the plant down. In re Florida Power and Light Company, (Turkey Point Plant, Unit 4), DD-81-21 (1981)(The "Director's Decision"), reproduced in FPL Pet. App. 16, 23 n. 12; R. Doc. No. 15, Lorion Jt. App. 55-58, 102-03.[7] The problem was such

7. These facts are taken from the Director's Decision (FPL App. 16-25) and from the documents upon which it relied. Copies of those documents were included in the [Footnote continued on next page.]

that in April, 1981, one of the NRC's Safety Engineers took the unusual step of writing the Chairman of the House Subcommittee on Energy and Environmental Affairs to alert him to the severity of the problem. After describing the technical problem, he concluded:

> This compound transient, known as pressurized thermal shock, is capable of catastrophically fracturing a reactor vessel that has been exposed to a neutron fluence corresponding to only a few Full Power Years Equivalent (FPYE) of operation, and has a high copper content of about 0.4% in its walls or welds.
>
> A reactor vessel fracture is one of the most serious accidents a reactor may experience. Depending upon its location and mode,

7. [Continued]

Joint Appendix filed in the court below ("Lorion Jt. App.") and identified by document number in the Certified Index to the Record reproduced in the Joint Appendix filed in this Court (Jt. App. 9-12). The citations in the following text and notes identify the document by number ("R. Doc. No.") and the relevant pages as they were reproduced in the Lorion Joint Appendix ("Lorion Jt. App.").

> it is almost certain to cause a core meltdown with all its public health and safety ramifications. . . .
>
> . . . [I]t is apparent to me that those PWR's [Pressurized Water Reactor] with high copper alloy vessels or welds, that have operated for 4 FPYE must be shut down until this matter is resolved in the technical arena.

Lorion Jt. App., 50, 102-03.[8] The NRC Staff promptly acknowledged that the problem was significant and had not been evaluated. They concluded from the preliminary data available:

> Nonetheless, the possibility of vessel failure . . . cannot be completely ruled out. If an overcooling event such as that at Rancho Seco [Nuclear Power Unit] were to occur, . . . the staff would expect much less than one failure in the current population of reactor vessels. Even for the vessel with worst material properties, the staff would not expect a failure.

Id., at 56. On this basis, the NRC staff recommended that an extensive evaluation program be launched, but concluded that "no immediate licensing actions" were required, id., at 57-59.

By August the NRC staff had identified the Turkey Point Plant, Unit 4 ("Unit 4"), operated by petitioner Florida Power & Light Company ("FPL") as one of eight operating plants most seriously affected by vessel embrittlement (FPL Pet. App. 23-24; R. Doc. No. 20, Lorion Jt. App., 147-50).

On August 21, 1981, the NRC Division of Licensing issued and docketed a formal directive pursuant to its Rule 50.54(f), 10 C.F.R. § 50.54 (R. Doc. 20, Lorion Jt. App. 147-53). According to the directive:

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8. The problem has been described and evaluated in articles prepared for general distribution. See E. Edelson, Thermal Shock--New Nuclear Reactor Safety Hazard?, Popular Science, 55 (June, 1983) (for a non-technical description and summary of reactions from the scientific community).

> On the basis of our independent review, of the plants where neutron irradiation has significantly reduced the fracture toughness of the reactor pressure vessel (RPVs), all plants could survive a severe overcooling event for at least another year of full power operation. However, we believe additional action should be taken now to resolve the long-term problems.
>
> * * *
>
> Based upon current vessel reference and/or system characteristics, we have identified . . . Turkey Point 4 . . . as [one of the] plants from which we require additional information at this time.
>
> * * *
>
> In accordance with 10 CRF 50.54(f) . . ., you [FPL] are requested to submit written statements, signed under oath or affirmation, to enable the Commission to determine whether or not your license should be modified, suspended or revoked. Specifically, you are requested to submit the following information to the NRC within 60 days of the date of this letter.

Id., 147-48. The Commission's Office of Public Affairs announced that such directives had been issued to FPL and seven other reactor licensees, and that announcement precipitated widespread news coverage in the local media.[9]

b. On September 11, 1981, respondent Joette Lorion sent a letter to the Chairman and other members of the Commission expressing concern that FPL was being permitted to continue to operate Unit 4 at full capacity with a seriously embrittled pressure vessel and with 25% of its steam generator tubes plugged[10] in the face of the NRC staff's recognition that each of

9. See NRC Staff Seeks Additional Information on Pressure Vessel Thermal Shock, supra n.1; see also, e.g., M. Toner, "U.S. Reports Possible Flaws in N-Plants: Old Steel 'Vulnerable' at Turkey Point," The Miami Herald, (Sept. 8, 1981) § A, p.1.

10. In September, Unit 4 was shutdown for steam generator inspection. Its steam generators were subsequently replaced. Ms. Lorion acknowledges that the specific concerns she raised with respect to Unit 4's steam generators and tube plugging have become moot at this point.

these conditions created serious and unresolved safety issues (Jt. App. 6-8). She asked them to immediately initiate a license review, to derate the unit, and, if necessary, temporarily suspend the operating license. Id. Unbeknownst to Ms. Lorion, the Commission referred this letter to the Director of its Office of Safety Regulation ("the Director") for disposition under its Rule 2.206 (10 C.F.R. § 2.206) (FPL Pet. App. 17).

The Director reviewed submissions from FPL and his own staff and decided that no proceedings should be instituted with respect to FPL's operating license for Unit 4. On November 5, 1981, the Director notified Ms. Lorion that her letter had been treated as a request under Rule 2.206 that the Director institute proceedings for the suspension or modification of FPL's license pursuant to Rule

2.202, (10 C.F.R. § 2.202) (R. Doc. No. 2, Lorion Jt. App., 3-4).

In the accompanying Director's Decision, the Director acknowledged that both the steam generator tube and reactor vessel integrity were significant problems that had not been resolved (FPL Pet. App. 22-24). The Director concluded that, since inspection of the steam generator tubes was underway, this concern had become largely moot (id., 19).

The Director acknowledged that the N.R.C. staff's site-specific concern over the integrity of the vessel at Unit 4 was such that the Director of the Division of Licensing had issued a Rule 50.54(f) directing FPL to submit statements under oath to enable the Commission to determine whether or not its license should be modified, suspended or revoked, (id. at 23-24; R. Doc. No. 20, Lorion Jt. App.

147-53). Although that directive required a response not later than October 20, 1981, neither the record nor the Director's Decision contained any reference to a response by FPL or any explanation of its absence. The Director simply concluded that no proceeding with respect to the embrittlement question was required (FPL Pet. App. 24). Accordingly, the Director decided that no proceeding would be instituted with respect to FPL's license for Unit 4 (id.).

Although the Commission's rules prohibit any petitions for Commission review of a Director's decision under Rule 2.206, Ms. Lorion promptly advised the Commission that she had not intended her letter to be a formal request under Rule 2.206. More importantly, she informed the Commission that had she known her letter was being so treated, she would have

instructed counsel to submit appropriate documentation to assure that the Director was fully aware of the nature and factual bases for her contentions (R. Doc. Nos. 4 and 5, Lorion Jt. App. 15-17). The Commission, with two members dissenting, subsequently decided not to review the decision on its own motion, and the Commission's Secretary advised Ms. Lorion that the Director's decision had become final agency action on December 11, 1981 (R. Doc. No. 6, id. at 18).

4. The Court of Appeals Proceedings and Decision.

a. Ms. Lorion petitioned the Court of Appeals for review. She claimed that the Director's reliance upon ex parte submissions from his own staff and from the licensee without affording her any notice or opportunity to participate had in the context of this case, constituted

an arbitrary and capricious denial of any meaningful process. Her principal contention was that Rule 2.206 had been applied here (and in other cases) in a manner that precluded meaningful review of directors' decisions [Lorion Br. at 13-25 Lorion v. NRC, No. 81-1132 (D.C. Cir. 1983)]. She also claimed that, in view of her factual contentions and the admitted severity of the two concerns she had raised, the Director's decision to resolve these questions without notice on an ex parte record was arbitrary and capricious and constituted an abuse of discretion (id.).

The Commission and FPL argued that the agency process established by Rule 2.206 did not constitute a 'proceeding' and, thus, that Ms. Lorion was not entitled to the kinds of procedural rights afforded a party to a proceeding under the Act or the APA. According to the Commission: "A

request for an enforcement proceeding is just that--a request. Unless and until granted, it is not a 'proceeding' where the requester has any right to present evidence." NRC Br. at 24-25, Lorion v. NRC. The Commission and FPL also argued that the 547-page ex parte record upon which the Director had acted demonstrated that his decision was correct (id. at 29-31, FPL Br. at 20-24, Lorion v. NRC).

b. These contentions made clear to the Court of Appeals a dilemma that had been created by two parallel and inconsistent lines of decisions. As the Commission argued, the courts of appeals had determined that the agency process authorized by Rule 2.206 was not a 'proceeding' within the meaning of subsection 189(a) in which the Commission was required by law to afford the person making the request a hearing or any of the other rights of a

party to a 'proceeding' (FPL Pet. App. 6-7). In two other cases, however, the Court of Appeals acknowledged that it and the Court of Appeals for the Seventh Circuit had construed the director's decisions under Rule 2.206 to be "final orders" entered in a "proceeding of the kind specified" in subsection 189(a) of the Act as the necessary predicate for direct review by the courts of appeals pursuant to subsection 189(b) (id. at 7-10). The dilemma became apparent in this case because the Court of Appeals was being asked to review a director's decision that acknowledged that the underlying safety concerns Ms. Lorion had raised were serious in which the Director had denied relief on the basis of a 547-page record consisting solely of ex parte submissions by the licensee and the agency staff.

c. The Court of Appeals concluded that it could not properly avoid the restriction Congress had imposed upon that court's jurisdiction when Congress explicitly referenced its use of the word "proceeding" in the jurisdictional grant in subsection 189(b) to the kinds of "proceeding" Congress had specified in subsection 189(a) (FPL Pet. App. 10-12). In the absence of any evidence in the legislative history that Congress had envisioned its jurisdictional grant to extend beyond orders entered in formal hearings (id. at 13), the Court of Appeals concluded that it must defer to the legislative judgment clearly embodied in the language and in the unusual interlocking statutory scheme Congress had employed (id. at 11-13).

The panel recognized that its departure from existing precedent was unusual.

For that reason its opinion meticulously canvassed the principles of statutory construction that this Court and the courts of appeals had applied to infer jurisdiction in order to avoid unnecessary bifurcation of judicial forums in construing more ambiguous schemes in other statutes (id. at 11-12). It concluded, however, that the unusual cross-referencing and interlocking scheme that combined the jurisdictional grant with the specifications of Commission proceedings foreclosed the application of any of these principles (id.). Moreover, the panel took the extraordinary step of having that part of its opinion reviewed and approved by the full court (id. at 14 n.**).

The Court of Appeals acknowedged that the Commission's development of new types of agency action to address emerging problems might require amendments to the

statutory scheme for judicial review (FPL Pet. App. 13-14). The court concluded, however, that established principles of statutory construction and a recognition of the limits of the judicial function committed this issue to Congress (id. at 14-15). Accordingly, the court dismissed the case for want of subject matter jurisdiction and transferred it to the United States Court for the District of Columbia pursuant to 28 U.S.C. § 1631 (1982) (id. at 13, 15).

d. The licensee and the federal petitioners separately petitioned this Court to grant a writ of certiorari to resolve the conflict the decision below had created. Although that request made it certain that consideration of her underlying concerns would be further delayed, respondent Lorion acknowledged that the decision below had created

conflict likely to require action by this Court. Apart from noting that prudential concerns might dictate deferring the question, she did not oppose the petitions. On March 26, 1984, this Court granted the petitions and consolidated the two cases.

SUMMARY OF ARGUMENT

The precise wording and the structure Congress adopted expressed a clear intent to carefully identify the specific kinds of proceedings in which Congress intended the Commission to be bound by the APA procedural requirements for licensing and adjudication. The joinder of that specification with the limitation upon the kinds of proceeding Congress intended to have reviewed by the courts of appeal and the express wording adopted are equally clear. The hearing requirement applies to the kinds of agency proceedings specified

in subsection (a); the jurisdiction of the court of appeals extends to all, but only, the final orders that result from the kinds of proceedings to which the hearing rights attached (see discussion infra, pp. -).

The Court of Appeals understated the support for its conclusion provided in the legislative history. The legislation as initially proposed specified in section 181 that the APA was applicable to all 'agency acts'. The primary review mechanism was to be a Review Board within the Commission. The language of the grant of jurisdiction to the courts of appeals constituted section 189 and was identical, a relevant part, the jurisdictional grant that had been included in the Federal Communications Act of 1930. See discussion infra, pp. - , and .

After extended hearings, these proposals were extensively modified. The revised bills added a requirement to section 181 that would have required that the Commission "grant a hearing to any person materially interested in any 'agency action'." The Review Board has eliminated and the jurisdictional grant was limited to final orders in licensing and rulemaking proceedings. The identical reports that accompanied the bill in each house made it clear that section 181 had been amended to extend the APA's administrative hearing procedures to all "agency actions," while the jurisdictional grant in section 189, as modified, extended only to "certain agency actions." See discussion infra, pp. - .

The conflicting contentions were settled late in the legislative process. On July 14, 1954, the Vice Chairman of the

Joint Committee on Atomic Energy, Senator Hickenlooper, filed two proposed amendments in the Senate--one amending proposed section 181; the other amending proposed section 189. The hearing requirement was deleted entirely from section 181. A new hearing requirement, the hearing requirement ultimately adopted, was added to section 189 as a new subsection (a). The jurisdictional grant to the courts of appeal was amended to substantiate its present language and was reincorporated as subsection (b).

The colloquy between Senator Hickenlooper and Senator Pastore, also a member of the Joint Committee, took place two days later. Senator Hickenlooper advised his colleagues that the hearing requirement had been moved from section 181 and amended to "clearly specify the types of Commission activities in which a hearing

is to be required," while the jurisdiction grant had been reincorporated in subsection (b) and altered to "clarify the intent of Congress with respect to the applicability of [the Hobbs Act]." Senator Pastore offered the further explanation: "The amendment limits the provisions to hearings on licenses in which a review shall take palce." Senator Hickenlooper reaffirmed that interpretation and the amendment was immediately adopted. Respondent found petitioners presentation of the legislative sufficiently misleading to justify a rather full presentation of the evidence. See discussion infra, pp. -).

The construction of section 189 adopted by the Court of Appeals reached the only result consistent with the language and purpose of the Hobbs Act. The application of the Hobbs Act's provi-

sions do not permit a court of appeals to remand to the agency a case in which a hearing is not required by law. The provisions codified at 42 U.S.C. § 2347(b) will require that the Court of Appeals transfer any appeal in which the petitioner can show, by pleading or affidavit, that there is a genuine issue of material fact. See discussion, infra, pp. - .

Against this background, petitioners contentions and the respective positions of the parties in this Court are reminiscent of the Court's somewhat whimsical remonstrance in Vermont Yankee-Nuclear Power Corporation v. NRDC, 435 U.S. 519, 539-40 and n.15. Petitioners' contentions have made it this time on ironic "quadrille." Respondent submits thatit is petitioners here, rather than the court below, who have seriously "misread or misapplied [the] statutory and decisional

framework" that this Court forcefully affirmed in Vermont Yankee. See discussion, infra pp. - .

To achieve a result in this case, petitioners ask the Court to construe section 189 as if it contained the wording that Congress considered and rejected. They ask this Court to construe the Hobbs Act as if 28 U.S.C. § 2347(b)(3) had not been adopted and read into that statute an implied power that will enable, nay compel, the Court of Appeals to impose its own notion of proper proceedings upon the commission's Rule 2.206 agency process. They ask this Court to equate the agency process here with agency proceedings in which a hearing is required by the law of administrative procedure but need not be held if the law of adjudication permits summary disposition. See discussion infra, pp. - .

Petitioners suggest speculative concerns over the possible bifurcation of review that might result from the lower courts' decision as a ground upon which they ask this Court to construe the Act in a manner that must result in the trifurcation of review and that ignores the respective competence of the courts of appeal and the district courts. This they ask, even though it seemingly lies within the agency's power to avoid the problems entirely by incorporating a right of intra-agency appeal on to its Rule 2.206 process, and lies with Congress's prerogatives to determine whether the agency process the Commission has developed for the 1980's requires further amendment to the 1954 legislative chapter. Respondent submits, simply, that petitioners argue against this Court's decision in Vermont Yankee, and that is what makes the quad-

rille ironic for respondent. See discussion infra, pp. - .

The agency process permitted by Rule 2.206 has evolved substantially since its adoption in 1974. At the outset, the Commission apparently thought it was a necessary process to provide a vehicle by which new matters raising significant health or safety issues might be brought to its attention. As originally formulated, Commission policy required notice of all but the most frivolous requests be published. So too, a person aggrieved by a director's denial of a request could petition the Full Commission for review. See discussion infra, pp. - The Commission has retreated steadily from those policies. In 1977, the Commission amended the Rule to prohibit the filing of petitions for review within the agency. In 1978, the Commission construed its own

statutory mandate and declared that the agency process authorized by Rule 2.206 was not a "proceeding" within the meaning of Section 189(a) and thus that persons making requests could properly be excluded. See discussion infra, pp. - .

Since 1979, the trend has accelerated. Following the events at Three Mile Island, the concerns and the number of people who hold them, increased dramatically as did the number of requests submitted. The agency process also changed, the publication of notices became at best sporadic, and director's decisions were accurately and officially known as "Directors Denials." It was during this period, that the jurisprudence of Rule 2.206 developed along conflicting lines. The Commission argued persistently and successfully that the exclusion of persons

making the request from the agency process was justified because the process was not a proceeding. The Commission also argued persistently and successfully that its directors' selectively constructed ex parte records foreclosed the courts of appeal from identifying any abuse of discretion. See discussion infra, pp.

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The anomaly became apparent in this case and made it plain the paradox had to be resolved. The same concerns that motivated Ms. Lorion had divided the NRC staff. All agreed that the unanticipated embrittlement coupled with the rather high probability of malfunctions requiring cooling procedures that would produce thermal shock enhanced the probability of a core meltdown accident. The problem was that formal consideration was not and has not been given to determining how

serious the embrittlement was at specific reactors or what probabilities should be used. See discussion infra, pp. -

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The specific concerns raised by Ms. Lorion make the need for a decision clear. The NRC licensing division acknowledged they were so serious that site specific information was required from FPL. The staff acknowledged they lacked generic data sufficient to enable it to reach a firm probability judgment. In that record here, the Director determined that he did not even need to see FPL's response before he denied respondent's request. And it was on this record that the Commission argued that it had not abused its discretion or acted arbitrarily and capriciously. And that it is the record that the Court of Appeals had and that this Court has before it to determine in what

forum respondent should have the factual contentions that she presented to the NRC resolved. That record illustrates the "practical concerns" that should motivate this Court. That record makes clear that the correct forum, so long as the agency retains its present process and absent legislative action, is the district court. See discussion infra, pp. - .

ARGUMENT

I. THE COURT OF APPEALS WAS CORRECT: THE AGENCY PROCESS BY WHICH DIRECTORS DECIDE NOT TO INSTITUTE PROCEEDINGS DOES NOT ITSELF CONSTITUTE A PROCEEDING OF THE KIND SPECIFIED IN SECTION 189 OF THE ATOMIC ENERGY ACT.

A. The language, structure, and legislative history of section 189 make it clear that Congress intended that the courts of appeal have jurisdiction to review only those final orders that resulted from "rulemaking" or "licensing" "proceedings" as those terms are used in the Administrative Procedure Act.

1. The technical issue that must be resolved in this case emerges from the

language Congress used in Section 189 of the Act:

> (a)(1) In any proceeding under this chapter for the granting, suspending, revoking, or amending of any license or construction permit, . . . the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to such proceeding . . . .

42 U.S.C. § 2339.[11] The Commission has consistently and successfully maintained that the agency process authorized by Rule 2.206, 10 C.F.R. § 2.206, does not constitute a "proceeding" of the kind specified in subsection 189(a) in which they would be required to admit the person

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11. Section 189(a) also specifies procedural requirements for rulemaking proceedings dealing with the activities of licensees and for certain compensation proceedings authorized or required under the Act. Petitioners here have acknowledged that, if the agency process authorized by Rule 2.206 is a proceeding at all, it can only be a "proceeding for the suspending, revoking, or amending" of the license.

making the request as a party and in which they would be required to grant that person the procedural rights mandated by the Act, by the APA, or by its own rules for such proceedings. Thus, the technical issue presented is whether Congress intended the term "proceeding" in section 189(b) to encompass agency process that would not fall within the term "proceeding" as Congress used it in section 189(a) or as Congress had defined it in the APA, 5 U.S.C. § 551(12)? The Court of Appeals found it had not.

The Court of Appeals was clearly correct in rejecting the strained construction petitioners urge here. The plain language of the jurisdictional grant, the interlocking structure of that section and its relation to the Act's other provisions governing "Judicial Review and Administrative Procedure" (42

U.S.C. §§ 2231-42), and its legislative history support the conclusions that Congress intended to restrict the jurisdiction of the courts of appeals to final orders entered in the kinds of proceedings specified in section 189(a). Those were precisely the kinds of proceedings that would generate a record suitable for direct review in the courts of appeal. The language of the Hobbs Act reinforces this conclusion because this is not a case in which a court of appeals, assuming jurisdiction, could remand to the agency for a hearing. 28 U.S.C. § 2347(b). Collectively, these factors combine to compel the conclusion that the Court of Appeals correctly found no evidence sufficient to support an inference that Congress intended the courts to depart from the plain meaning of the words Congress chose.

2. The language of the Act makes it clear that Congress understood the distinction between "licensing" and "rulemaking" "proceedings" on the one hand and other forms of "agency action" on the other. Section 181 of the Act makes the provisions of the APA governing administrative procedure [5 U.S.C. §§ 551-59] and judicial review (id., §§ 701-06) applicable "to agency action taken under this chapter" and expressly provides that "the terms 'agency' and 'agency action' shall have the meaning specified in [5 U.S.C. § 552]." 42 U.S.C. § 2231.[12] In that same section Congress recognized that the term "agency action" embraced more than just "agency proceedings": It excluded from the application of the APA "the case of agency proceedings or actions" that involved defense information or other restricted data. Id.; emphasis added.

Sections 182 through 187, 42 U.S.C. §§ 2232-37, address the conditions under which licenses and construction permits

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12. The definitions in the APA make it clear that the term "agency action" embraces far more than orders entered in "agency proceedings." Under the APA, the term "agency proceedings" is defined as a limiting term: it includes three, and only three kinds of agency process -- rulemaking, licensing, and ajudication. 5 U.S.C. § 551(12). "Agency action" is defined as an inclusive term: it includes all actions granting or denying relief as well as refusal to act. Indeed, the

[Footnote continued on next page.]

12. (Continued)

principal function of the APA was to prescribe the procedural requirements that agencies must observe in rulemaking, licensing, and adjudicative proceedings while preserving their flexibility to develop other forms of agency process to address other problems as they emerged. Petitioners here, of course, are implicitly inviting this Court to retreat from its decision in Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519 (1978) (courts may not impose procedural requirements upon agency decisionmaking processes in excess of those required by APA). They ask this Court to authorize the Court of Appeals to remand to the agency for a hearing an agency action for which no hearing is required under the APA.

are to be granted, revoked, and modified. Section 188, id. § 2238, makes provisions for the Commission to order the continued operation of facilities whose license has been revoked and provides that just compensation be paid for the public use.

Section 189 then establishes in subsection (a) the framework within which the Commission is to conduct the necessary licensing proceedings, rulemaking proceedings with respect to "the activities of licensees", and proceedings for compensation adjudications,[13] and prescribes in subsection (b) that the resulting orders from proceedings of the kind specified in subsection (a) shall be reviewed in the courts of appeals. Id. § 2239.

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13. The three sections that have been added since the Act was originally adopted are consistent with this pattern. They make provisions for the establishment of the Atomic Safety and Licensing Boards, the use of license incident reports as evidence in court proceedings, and the issuance of temporary operating licenses. 42 U.S.C. §§ 2240-42.

3. The legislative history simply reinforces the clear intent of the language and structure of section 189 and the Act's other provisions governing administrative procedure and judicial review of Commission proceedings. In April, 1954, a comprehensive proposal to amend the Atomic Energy Act of 1946, as amended, was introduced in both Houses of Congress. Joint Committee on Atomic Energy, (the "Joint Committee"), A Proposed Act to Amend the Atomic Energy Act of 1946 (Jt. Comm. Print, April, 1954), reproduced in I Legislative History of the Atomic Energy Act of 1954, 53-104 (Atomic Energy Commission 1955) [hereinafter "Leg. His."]; identical proposals introduced as H.R. 8862 (Apr. 15, 1954), I Leg. Hist. 105-79, and S. 3323 (Apr. 19, 1954), id., 181-255.

The original language of the proposed section 181 made the provisions of the APA

applicable "to all 'agency acts'" and required that the "full regular administrative procedures" were to be followed (unless national security or like concerns required otherwise). H.R. 8862, § 181, I Leg. Hist. 161-62; S. 3323, § 181, id. 237-38. Under section 188 of that proposal, a separate Review Board was established as the adjudicative body within the Commission with authority to review any "action" of the Commission in precisely the same kinds of proceedings now specified in section 189(a) of the Act. H.R. 8862, § 188, I Leg. Hist. 166-67, S. 3323, § 188, id. 242-43. Proposed section 189 contained only a broad grant of jurisdiction to the courts of appeal:

> Any proceeding to enjoin, set aside, annul or suspend any order of the Commission shall be brought as provided in the [Hobbs Act]

and authorized the Commission itself to appeal from adverse decisions of the Review Board. H.R. 8862 §§ 181, 189, reproduced in I Leg. Hist. 161-62, 167-68; S. 3323 §§ 181-189, reproduced id. 237-38, 243-44.

The Joint Committee held hearings in May, 1954.[14] In late May, the Joint Committee issued proposed revisions to the pending bills. The revisions eliminated the Review Boards and revised section 189 to provide:

> Any final order granting, denying, suspending, revoking, modifying, or rescinding any license . . ., or any final order issuing or modifying rules and regulations dealing with the activities of licensees entered in an agency action of the Commission shall be subject to judi-

14. Joint Committee, Hearings on S. 3323 and H.R. 8862 ["Hearings"]; Pt. I (Comm. Print. 1954), reproduced in II Leg. Hist., 1629-2194. Those hearings indicate that there was concern over the use of a review board, but otherwise offered little indication of the Committee's thinking. Id., at 1924.

> cial review in the manner prescribed in the [Hobbs Act] . . . and to the scope of review and the other remedies provided by section 10 of the Administrative Procedure Act [of 1946, Pub. L. No. 79-404 § 10. 60 Stat. 237, 243-44 (1946)].

See Joint Committee, Comparative Print of Committee Print Revise on H.R. 8862 and S. 3323 Compared with the Atomic Energy Act of 1946 ["Comparative Print"], § 189, I Leg. Hist. 351, 509-11. On June 30, 1954, following further hearings by the Joint Committee,[15] identical revised bills approved by the Joint Committee were introducted in the House and Senate. H.R. 9757, reproduced in I Leg. Hist. 541 (replacing H.R. 8862) and S. 3690, id. 654 (replacing S. 3323).

The provisions governing administrative procedure and judicial review in the two bills were the same as those in

15. Hearings, Pt. II, reproduced in II Leg. Hist. 2197-2795.

the Joint Committee's May proposal with two exceptions. Proposed section 181 had been amended by adding the provision, "Upon application, the Commission shall grant a hearing to any party materially interested in any 'agency action.'". H.R. 9757, § 181 (as introduced June 30, 1954), I Leg. Hist. 541, 625; S. 3690, § 181 (as introduced June 30, 1954), id. 645, 628. Second, proposed section 189 had been altered only by the insertion of single quotation marks around the words "agency action." id. at 631 and 733.

The Senate Bill, S. 3690, was accompanied by a report filed by Senator Hickenlooper Vice Chairman of the Joint Committee. S. Rep. No. 1699, reproduced in I Leg. Hist. 749. That report identified both the apparent intent of Congress and a potential conflict in the language of the bill as drafted.

> Section 181 makes the provisions of the Administrative Procedure Act applicable to all agency actions of the Commission. . . . The Commission is required to grant a hearing to any party materially interested in any agency action.
>
> * * *
>
> Section 189 provides for judicial review of a final order of the Commission entered in certain agency actions . . . .

S. Rep. No. 1699, at 28-29, I Leg. Hist. at 776-77; emphasis supplied. See also H. Rep. No. 2121, 28-29 (July 12, 1954), reproduced in I Leg. Hist. 997, 1024-25 [containing the same comment on proposed sections 181 and 189 in H.R. 9757 (as reported July 12, 1954), id. 893, 976-97, 983].

On July 14, 1954, Senator Hickenlooper, the Vice Chairman of the Joint Committee on Atomic Energy, filed proposed amendments to section 181 and to section 189 to resolve that conflict. Under the amend-

ments, section 181 was amended in two ways. The first sentence was to be amended to clarify Congress's intent that the provisions of the APA should apply to "all agency action taken under the Act" and to make clear that "the terms 'agency' and 'agency action' shall have the meaning specified" in the APA. Second, the requirement that "the Commission shall grant a hearing to any party materially interested in any agency action" was removed from that section.

The proposed amendment to section 189 restructured that provision and cast it in substantially the form in which it was ultimately adopted. The section was divided into its two subsections. The hearing requirement and the kinds of proceedings to which it applied were inserted as subsection a; and the grant of jurisdiction to the court of appeals was

rewritten to specify precisely which "certain agency actions" were included.

The proposed amendments provided in relevant part:

> Sec. 181. GENERAL--The provisions of the Administrative Procedure Act [of 1946] shall apply to all agency action taken under this Act, and the terms "agency" and "agency action" shall have the meaning specified in the Administrative Procedure Act: * * *

S. 3690: Amendment [section 181], reproduced in I Leg. Hist. 1149.

> Sec. 189. HEARINGS AND JUDICIAL REVIEW--
>
> a. In any proceedings under this Act for the granting, suspending, revoking, or amending of any license or construction permit, or application to transfer control, and in any proceedings for the issuance of modification of rules and regulations dealing with the activities of licensees, and in any proceeding . . . [for the payment of various specified types], the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to such proceeding.

> b. Any final order entered in any proceeding of the kind specified in subsection a. above entered in an "agency action" of the Commission shall be subject to judicial review in the manner prescribed in the [Hobbs Act] and to the provisions of section 10 of the Administrative Procedure Act, as amended.

S. 3690: Amendment [section 189], reproduced in I Leg. Hist. 1145-46.

Against this background, the colloquy between Senator Hickenlooper and Senator Pastore, also a member of the Joint Committee, on July 16, 1954, is clear. After introducing the proposed amendment to section 189, Senator Hickenlooper explained

> MR. HICKENLOOPER. . . . this section reincorporates the provisions of hearings formerly made part of section 181, but clearly specifies the types of Commission activities in which a hearing is to be required. The purpose of this revision is to specify clearly the circumstance in which a hearing is to be held. This section also reincorporates the former provisions of section 189 dealing with

judicial review. There is a slight change in the wording to clarify the intent of Congress with respect to the intent of the applicability of [the Hobbs Act] and the applicability of [the judicial review provision of the then APA].

* * *

MR. PASTORE. As a matter of fact, referring to the bill S. 3690, as reported, [the provision of section 181 as set forth at I Leg. Hist. 728-29] the bill refers to "agency action". That wording was thought to be broad, broader than it was intended to make it. The amendment limits the provision to hearings on licenses in which a review shall take place.

MR. HICKENLOOPER. The Senator from Rhode Island is correct.

. . .

100 Cong. Rec. 10171, reproduced in III Leg. Hist. 3175; emphasis added. Whereupon the amendment was agreed to, id. The Act as finally adopted clarified the meaning further by limiting the applicability of subsection b. to orders "entered in a proceeding of the kind specified in

subsection (a) of this section" and by deleting the words "entered in an agency action of the Commission." Section 189(b) of the Act, Pub. L. No. 83-703, 189(b), 68 Stat. 919 (1945), reproduced in I Leg. Hist. 1, 37-38.

The evidence of Congress's intent makes it clear that it intended the APA to apply to "all agency actions," but it intended review by the courts of appeals to be limited to "certain agency actions." In that context, only one interpretation of the amendments that produced the final version and the colloquy between Senators Hickenlooper and Pastore is consistent with that evidence. The hearing requirement for "all agency actions" was deleted from draft section 181 because it was too broad. Section 189 was amended to specify in subsection (a) those "certain agency actions" in which a hearing was to be

required by law, and the jurisdictional grant was amended and reincorporated as subsection (b) to make it clear that the certain agency actions for which a hearing was required by law were precisely the same as the "certain agency actions" that Congress intended to have reviewed in the courts of appeals.

The Court of Appeals below reviewed this evidence meticulously and concluded that there was no evidence in the sparse legislative history to suggest Congress intended to grant the courts of appeals jurisidiction that extended beyond the precise and plainly expressed jurisdictional grant embodied in the words and the unusual interlocking structure of the statutory grant itself (FPL Pet. App. 12-13). Respondent submits that, if anything, the Court of Appeals understated the conclusion. What evidence there is

affirmatively supports the lower court's construction, and petitioners' attempts to suggest otherwise seem disingenuous at best (see Br. Fed. Pet., 24-28; see also FPL Br., 17 n.13). Moreover, that construction is the only construction that produces a result consistent with the purposes Congress sought to achieve and the statutory framework it created when it adopted the Administrative Orders Review Act (Hobbs Act), 28 U.S.C. §§ 2341, et seq., in 1950.

4. The Hobbs Act was a precise statute adopted after long study to address a specific set of problems. H.R. Rep. No. 2618, reproduced in [and hereinafter cited to] 1950 U.S.Code Cong. Serv. 4303-06. By the Urgent Deficiences Act of 1913, Congress had identified certain agency orders as sufficiently important to require special provision for judicial

review, id., 4304. The Urgent Deficiences Act provided for review by special three-judge district courts with a right of appeal directly to this Court, id. For many of these agency actions, the person challenging the action was entitled to a de novo trial before a three-judge court, id., 4305.

By the early 1940's, it had become clear to most observers that the use of three-judge panels to perform a task ordinarily better done by a single judge was a wasteful and inappropriate use of judicial resources, id., 4304-06. So too, Chief Justice Stone and others had complained that the right of direct appeal had forced this Court to devote substantial time to what seemed to be an early judicial version of 'trivial pursuits', id., 4304. These nearly unanimous expressions of concern were insufficient to move

Congress, however, until after it had adopted the APA in 1946.

The procedural requirements imposed by the APA satisfied Congress that for most of the agencies whose orders were covered by the Hobbs Act, "the record before the agencies will be made in such a way that all questions for the determination of the courts on review, and the facts bearing upon them, will be presented and the rights of the parties will be fully protected." Id., 4306. Congress recognized explicitly that this would not always be true. For example, Congress recognized that it had not limited the jurisdiction of the courts of appeals to "certain agency actions" of the Federal Communications Commission.[16] The broad

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16. H.R. Rep. No. 2618, 50 U.S. Code Cong. Serv. 4304; see also 28 U.S.C. § 2342(1) and 47 U.S.C. § 407(a) (courts of appeals granted exclusive jurisdiction in

[Footnote continued on next page.]

grant of jurisdiction with respect to that agency and the evolving nature of agency process made it clear to Congress even then that petitions would be filed in the courts of appeals asking them to review agency actions for which "a suitable hearing was not held" in the agency itself. Id., 4306. Congress expressly included what Congress determined was "adequate provision . . . for the taking of evidence either in the agency or the district courts" in those cases. Id; see also 28 U.S.C. § 2347(b) and (c) (for codification of provisions Congress deemed adequate).

Under those provisions, it is clear Congress did not intend or authorize the

16. (Continued)

"any proceeding to enjoin, set aside, annul, or suspend any order of the Commission under this chapter (except those appealed to [Court of Appeals for the District of Columbia])).

courts of appeals to remand to the agency petitions seeking review of the kind of agency process challenged here. Where a hearing has not been held in fact and where the court of appeals determines that a hearing was not required by law, the court of appeals has only two choices. If, but only if, the person seeking relief is unable to establish, by pleading or affidavit, that any genuine issue of material fact is presented, then and only then, the court of appeals must pass upon the issues of law presented. 28 U.S.C. § 2347(b)(2).[17] But if a genuine issue of material fact is presented, then the court

17. As the record compiled in response to Ms. Lorion's two-page letter demonstrates, the substantial factual issues must often be resolved when serious safety concerns are raised by a person seeking relief under Rule 2.206. Future concerned citizens and their counsel should regularly be able to demonstrate the existence of one genuine issue of material fact and thereby satisfy the pleading requirement necessary to compel transfer to the district court. See discussion, infra.

of appeals must transfer the proceedings to a "district court for the district in which the petitioner [here Ms. Lorion] resides . . . for a hearing and determination as if the proceeding were originally initiated in that court . . . [and under the procedures established] by the Federal Rules of Civil Procedure." Id., § 2347(b)(3). The Congressional determination is clear and explicit and does not authorize remand to the agency.[18]

Against this background, petitioners' contentions are truly exceptionable.

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18. The provisions of 28 U.S.C. § 2347(c) authorize remand to the agency where a party to the proceeding petitions the court of appeals for this relief and shows that his or her failure to adduce the evidence in the agency proceeding was excusable. Implicitly and structurally that subsection applies only to proceedings in which the agency held a hearing (or was authorized by law to hold one) and requires that one of the parties seek interlocutory relief. It is not applicable here.

B. The Court of Appeals construed Section 189 in a manner that respects the jurisdictional scheme Congress prescribed in the Administrative Orders Review Act and that respects the Commission's determination that Rule 2.206 provides an adequate and appropriate kind of agency process for making decisions such as the one made in this case.

Petitioners developed four lines of argument. Each is flawed, and the flaws build upon one another to suggest a result whose logical and practical consequences differ dramatically from those petitioners suggest. Respondent suggests that here it is the federal petitioners, rather than the court below, who have "seriously misread and misapplied [the] statutory and decisional law cautioning reviewing courts against engrafting their own notions of proper procedures upon agencies entrusted with substantive functions by Congress." Vermont Yankee, supra, 435 U.S. 519, 525. Respondent submits that petitioners have

gone further still. In their zeal to win the day, they have sought to persuade this Court to intrude upon Congress's prerogatives in order to engraft petitioners' notions of how the jurisdictional grant expressed in the Act should have been written. Respondent submits, however, that petitioners themselves are likely to be uncomfortable with practical consequences that must logically flow from the decision they ask this Court to make. The bases for respondent's analysis follows:

1. Petitioners contend that Congress patterned the jurisdictional grant in section 189 upon the jurisdictional grant embodied in the Federal Communications Act of 1934, 47 U.S.C. § 402(a) ["§ 402(a)"]. (Br. Fed. Pet., pp. 28-33; cf. FPL Br., p. 30). From this they ask this Court to infer that Congress intended section 189 to be applied in the same manner and to so

apply it, citing this Court's recent decision in FCC v. ITT, 104 S.Ct. 1936 (1984), id.

Petitioners are partly correct: The jurisdictional grant the Joint Committee initially proposed copied the language of section 402(a) in every relevant aspect. Compare H.R. 8862, § 189, quoted supra p. 52 , with § 402(a). The subsequent legislative history, however, establishes one conclusion to a rare degree of certainty: Congress rejected the language and with it the pattern. The Joint Committee's first major revision made it clear that they had concluded that the APA was to apply to "all agency actions", but that the jurisdiction of the courts of appeal was to extend only to "certain agency actions" (see discussion supra pp. 58-60). The ambiguity that remained was removed when Congress limited the APA hearing require-

ment to "certain agency actions" and specified in the same section that it was the final orders that emerged from the kind of "certain agency actions" for which Congress had imposed the hearing requirement (see discussion supra, pp. 60 - 61).

Petitioners ask this Court to hold that Congress intended to adopt the very language it deleted from the statute and, thus, that its repeated deliberations and amendments were meaningless. Respondent had not understood this to be an option open to the courts under this Court's decisional jurisprudence. Respondent submits that such a construction would constitute an explicit invitation to the lower courts to exercise their creative powers to identify tenuous bases upon which to engraft their own notions of the proper scope of their own jurisdiction. Here an oft-divided and sometimes criti-

cized Court of Appeals unanimously rejected the invitation, and correctly so.

2. Petitioners contend that the language of the Hobbs Act, the purpose for which it was adopted, and this Court's decisions support the conclusion that the Court of Appeals erred (Br. Fed. Pet., pp. 28-33; cf. FPL Br., pp. 22-23, 30). To support that result, petitioners ask this Court to repeal one subsection of that statute and to turn occasional dicta into a holding that would permit the Court of Appeals to "impose its own notions of proper procedures upon agencies entrusted with substantive functions." Compare Vermont Yankee, 435 U.S. 519, 525.

The courts of appeals have consistently and uniformly upheld the Commission's position that agency process authorized by Rule 2.206 is not one for which a hearing is required by law. In

that circumstance, the language of the Hobbs Act is mandatory: if the pleadings in the court of appeals identify a genuine issue of material fact, the court of appeals "shall . . . transfer the proceedings to the district court." 28 U.S.C. 2347(b)(3). See discussion supra pp.).

The petitioners seek to avoid this disingenuously. See Br. Fed. Pet. PP. 15, 30-31; cf. FPL Br. 30. The Federal Petitioners note that "when a hearing is required by law or when a party wishes to adduce additional evidence," the Act provides for a remand to the agency" [Br. Fed. Pet., p. 31, citing 28 U.S.C. § 2347(b)(1) and (c) emphasis in original]. This case does not fall and cannot be brought within the terms of either subsection.

The Federal Petitioners compound the obfuscation by noting that the Hobbs Act has been regularly applied to review agency actions when no hearing in fact has been held. See, e.g., Br. Fed. Pet. 12-17. The are perfectly correct; they simply ignore the distinctions between those "proceedings" to which hearing rights attach and agency actions taken by other forms of agency process. No agency need hold a hearing if the person seeking it lacks the administrative equivalent of standing (id., p. 13) or if the contentions presented are not within the agency's subject matter jurisdiction (id.) or if they fail to state a claim upon which relief can be granted (id.) or if the record before the decisionmaker demonstrates there are no genuine issues of fact (id.). These propositions are as unexceptional as they are irrelevant.

The determination whether a "hearing is required by law" for a particular agency is a simple two-step process. The reviewing court first must determine whether the agency action was the kind of licensing, adjudication, or rulemaking proceeding for which the agency's underlying statute or the APA requires that the opportunity to be heard comport with the procedures legislatively prescribed. If it is such a proceedings, in law, and no hearing was held, in fact, the court must further determine whether law applicable to the proceeding justified the agency decision to act without a hearing. But the hallmark of all these proceedings is that a person whose rights may be affected has prescribed procedural rights and upon a proper showing must be permitted to participate in the agency process. The records that result from 'proceedings'

such as these are comprised of the materials the aggrieved parties had an opportunity to submit and to confront.

The decisions of this Court upon which petitioners rely were made in cases in which the party aggrieved had simply failed to satisfy the second step of the analyses. Although the agency process was a proceeding for which participatory rights were specified by law, the agency acted pursuant to law in not holding a hearing in fact. Here the agency process does not satisfy the first step: it is not a proceeding, the person submitting the request has no right to confront the record, and the action is based upon ex parte submissions by other persons whose interests may be affected. The final decision was made by a subordinate non-adjucatory official. The Rule prohibits the aggrieved party from seeking review within the agency.

3. Petitioners also contend that the Court of Appeals decision threatens inappropriate bifurcation of review that is inconsistent with the purposes of the Hobbs Act and the policy of conserving scarce judicial resources (Br. Fed. Pet., pp. 34-39); FPL Br., pp. 22-26). Petitioners' speculations are not supported by logic or experience. Under the Hobbs Act, the exercise of jurisdiction by the courts of appeal is likely to result in trifurcation of review--from the Director to the court of appeals to the district court to the court of appeals to this Court. Moreover, the result petitioners ask this Court to impose respects neither the competence of the courts of appeal nor that of the district courts.

Directors' decisions are decisions of subordinate agency officials. The Commission has decided that the appropriate

agency process should prohibit the person aggrieved from seeking any review within the agency, 10 C.F.R. § 2.206(c) and discussion infra. The directors' decisions usually constitute factural determinations made on an ex parte record concerning site specific concerns that will affect the community in which the reactor is located. See discussion infra. To suggest that subordinate agency officials should hold a power to make ex parte factual determinations and thereby compel a panel of three circuit judges to compare, in the first instance, the pleading and affidavits with the ex parte record to determine whether any genuine issue to be resolved does not respect either the competency or the limited resources of those courts. See discussion infra.

To the extent the Commission is correct in its perception that Rule 2.206

requests do not frequently raise significant issues, and precisely to that extent, the screening function as well as the record development function should be assigned where the Court of Appeals' decision placed it: on a single judge in the district where the persons affected reside. The judicial load will thus be distributed, the chaff will be efficiently discarded, and only ripe wheat is likely to come before the courts of appeal.

4. Finally, petitioners invite this Court to authorize the courts of appeals to intrude again upon an agency's process when that intrusion is neither necessary nor appropriate. If petitioners are correct and the Court of Appeals has the authority to remand a case to the agency for further proceedings where a hearing was not required by law, then the Court of Appeals has the authority to impose upon

the agency that court's notion of what constitutes a proper record and a proper process. Respondent had understood this Court to have rejected a similar contention in Vermont Yankee, 435 U.S. 519-25.[19]

In the context of this case, the invitation is as needless as it is inappropriate. If the Commission is in fact concerned about multiple layers of review, it has the power to redefine its process to convert it into a proceeding of the kind specified in Rule 2.206. The simple expedient of granting persons in the position of Ms. Lorion the right to appeal to the Atomic Safety and Licensing Board or to the Atomic Safety and Licensing Appeal Board would seemingly satisfy the proceeding requirement and the purpose for which it was imposed. An adjudicative

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19. Respondent and those who share her concerns would in fact be relieved to learn that their understanding of the import of that decision was incorrect.

body within the agency would screen the contentions, identify the issues, require an appropriate record, and express the agency's decision with a full awareness of an appropriate record, and express the agency's decision with a full awareness of the competing views. Such an order would be appropriate for review by the courts of appeals.

So too, if the Commission concludes that its regulatory needs in 1984 require that it continue the Rule 2.206 process in its present form and if petitioners' speculative concerns prove to be accurate, it may well be necessary for Congress to revisit the legislative decisions it made in 1954 when it enacted section 189 in its final form and settled the contentions that divided those who would have imposed a hearing requirement upon all agency

actions from those who sought a less restrictive mandate. But if those contentions are to be reopened it should be in the halls of Congress, not in the chambers of the courts.

Respondent was tempted to leave petitioners where their arguments have taken them; but the underlying concerns are too important. A proper understanding of the issues here requires an understanding of the evolution of Rule 2.206 and of the manner in which its application has changed over time, and of its application here. To that petitioner now turns.

II. THE TRUE PRACTICAL CONCERNS IN THIS CASE MAKE IT CLEAR THAT THE DISTRICT COURTS ARE THE FORUM IN WHICH THIS CASE SHOULD PROCEED

A. The Commission must accept the jurisdictional consequences that follow from the manner in which it has defined and applied the Rule 2.206 process.

Commission Rule 2.206, 10 C.F.R. § 2.206, was first published on April 1,

1974, (39 Fed. Reg. 12353). It established a procedure by which interested persons could request a show cause order be issued pursuant to Rule 2.206. 10 C.F.R. § 2.202. Rule 2.206 provided:

> § 2.206 Requests for action under this subpart.
>
> (a) Any person may file a request for the Director of Regulation to institute a proceeding pursuant to § 2.202 to modify, suspend or revoke a license, or for such other action as may be proper. * * * The requests shall specify the action requested and set forth the facts that constitute the basis for the request.
>
> (b) Within a reasonable time after a request pursuant to paragraph (a) of this section has been received, the Director of Regulation shall either institute the requested proceeding in accordance with this subpart or shall advise the person who made the request in writing that no proceeding will be instituted in whole or in part, with respect to his request, and the reasons therefor.

The avowed purpose for the amendment comprising the new Rule 2.206 was "to

provide a procedure for submittal of such requests to the "Director of Regulation." Prior to the adoption of 10 C.F.R. 2.206, requests for action to the Commission were not precluded although no specific provision existed therefore. [See Consumer Power Company (Midland Plant) (Units 1 and 2) 6 A.E.C. 1082 (1973) where prior to enactment of Rule 2.206 petitioners filed an "Emergency Petition" seeking to set aside "illegal action."]

Following its promulgation, the Rule was modified twice, first on August 15, 1977 (42 Fed. Reg. 36239 - 36240) and again in November 1980 (45 Fed. Reg. 73466), but did not materially change. In 1977, however, clear provision was added to the rule allowing the Commission to review, sua sponte directors' decisions that were denials to see if they constituted any abuse of discretion. That

amendment prohibited petitioners from seeking Commission review of a denial of a Rule 2.206 request by the Director:

> No petition or other request for Commission review of a Director's Decision under this section will be entertained by the Commission.

In the 1977 amendment to the Rule (42 F.R. 36239) under SUPPLEMENTAL INFORMATION, the Commission announced its policy on notice to parties in 2.206 actions, although these notice provisions were not incorporated into the rule:

> When such requests are received the affected licensee is notified and a notice of receipt is published in the Federal Register. This process is followed except for those occasional requests that are so obviously lacking in merit that a more abbreviated procedure may appropriately be followed. (emphasis supplied)

Shortly after the Commission established the rule known as 10 C.F.R. § 2.206, it also established, by its decis-

ions, criteria for implementation of a show cause order (10 C.F.R. § 2.202) under 10 C.F.R. § 2.206. It indicated that a show cause order must be issued where substantial health or safety issues concerning operation of a reactor have been raised, but need not be issued where only a mere dispute over factual issues exists.

> The Director correctly understood that show cause order would have been required had he reached the conclusion that substantial health and safety issues had been raised.

(Footnote omitted.) Consolidated Edison Company of New York, Inc. (Indian Point Units 1-3) CLI-75-8, 2 NRC 173, August 4, 1975.

The treatment of parties by the Commission when the rule was new is quite different from current Commission practice. Recently, States as well as public interest citizens have been denied the

opportunity to participate in Director's decisions. See Rodriguez v. NRC (voluntarily dismissed) No. 83-1805 (D.C. Cir. May 25, 1984, DD 83-6, 17 NRC 713 (1983) (State of New Jersey sought and was denied a hearing under 2.206, while the NRC was conducting a license proceeding); Bellotti v. NRC, 725 F.2d 1380, CLI-82-16, 16 NRC 44, 1982 (State of Massachusetts was denied participation in an NRC enforcement proceeding to modify a nuclear plant's operating license where severe safety problems existed).

In the early years of the Commission's implementation of Rule 2.206, while never formally recognizing any procedural or due process rights for requesters under the 2.206 process, petitioners typically were afforded some level of participation in the assemblage of a record as well as some relief if the claim was deemed to

have merit. It is interesting and of some significance to note, for example, that in Consolidated Edison, state and public interest participation was invited and the issues raised by petitioners were transmitted for review to an ongoing construction licensing proceeding before the Atomic Safety and Licensing Board for Indian Point Unit No. 3. See Consolidated Edison (Indian Point) 2 NRC 173, 179.

When petitioner in the above case, Citizens Committee for the Protection of the Environment (CCPE), filed a petition with the Commission for review of an adverse Director's Decision, " by order dated January 4, 1975, the Commission requested the views of the NRC Staff, the licensee and other interested persons as to the approriate measures to be followed." Consolidated Edison, id. at 174 (emphasis supplied). Respondents

included the New York Atomic Energy Council (NYAEC) as well as CCPE.

Indeed, in the early years the Commission explained the major reason for the existence of the procedure under 10 C.F.R. § 2.206 was for the consideration of:

> A significant unresolved safety issue or a major change in facts material to the resolution of major environmental issues [citing Vermont Yankee Nuclear Power Station ALAB-124, 6 AEC 358, (1973)] . . . .

Also, in Northern Indiana Public Service Company (Baily Generating Station Nuclear-1) CLI-78-7, 7 NRC 429 (1978), the Commission reiterated that:

> the standard to be applied in determining whether to issue a show cause order is, as we have said in Indian Point, whether substantial health or safety issues (have) been raised . . . .

The Commission emphasized that:

> [P]arties must be prevented from using § 2.206 procedures as a vehicle for the reconsideration of issues previously decided. . . . Northern Indiana at 434.

An evolution in the Commission expression of Rule 2.206 began when the Commission issued the changes at 42 F.R. 36239, 36240, on July 14, 1977, establishing notice criteria and provisions on Commission review of the Directors' decisions. The Commission's early practice showed some willingness to accommodate 2.206 petitioners while never formally acknowledging a "right to participate" in the 2.206 process. However, Commission practice since the late 1970's makes it clear that no procedural or due process rights are now accorded to a requester under 2.206.[20]

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20. The rule appears to have languished in relative non-use until 1979 when events changed rather abruptly. That year there were twenty-one (21) "Directors Decisions"

[Footnote continued on next page.]

The first case clearly expressing the Commission's interpretation that petitioners had no rights as a party in the 2.206 process occurred when the Commission issued its opinion in 1978 that the then little used agency process under the Rule

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20. (Continued)
or "Directors Denials" as the NRCI described them. In 1980, thirty-six (36) Directors Decisions went into the NRCI Volumes and another twenty-one (21) were reported in 1981. Why was there an avalanche of Directors Decisions reported beginning in 1979, when Rule 2.206 had languished virtually unused for the previous five years? It was perhaps more than coincidental that on the 28th day of March, 1979, the core began to overheat and almost melted at the Three Mile Island Nuclear Power Plant Unit No. 2 operated by General Public Utilities in Central Pennsylvania. America came face to face with near-nuclear disaster, an event (later classified as a Class 9 accident) that the U.S. Nuclear Regulatory Commission had assured members of the public could never and would never happen. A national concern about nuclear power arose. The Commission began to receive correspondence in diverse forms and origins from citizens, seeking to voice concerns about the safety of nuclear power plant operation. The agency responded with large numbers of Director's Denials.

at 10 C.F.R. 2.206 was "not a proceeding" within the meaning of section 189(a) of the Atomic Energy Act of 1954.

In Northern Indiana Public Service Company (Baily Generating Station Nuclear-4) ("Northern Indiana"), 7 NRC 429 (1978), aff'd, sub nom., Porter County Chapter Izaak Walton League, 606 F.2d 1364 (D.C. Cir. 1979), the petitioners raised the argument that the NRC Staff participated as a "party adversary" in the enforcement proceeding requested by the petitioners claiming that it is "fundamentally unfair and an unlawful combination of functions for the Staff to take part in the decision making" on petitioner's requests.

They also argued that these "dual and conflicting roles" are also prohibited by the APA, 5 U.S.C. § 551 et seq. (particularly 554); the Commission's Regulations at 10 C.F.R. §2.719, and procedural due

process guarantees. The Commission, in its memorandum and order answered these contentions by identifying two separate categories of responsibility or function of the Commission's subordinate staff members: the first dealing with "on the record adjudications and the second with "investigative or prosecutorial responsibilities." Thus it responded to petitioners:

> These contentions are in error both as a matter of law and of policy. Section 554 of the Administrative Procedure Act deals specifically with on the record adjudications, and is designed to assure the separation of functions between those persons with investigative or prosecutorial responsibilities and those with ultimate decisionmaking authority. Section 2.719 of the Commission's regulations has the same purpose. Here, however, no adjudication has been commenced, and the Administrative Procedure Act and 10 C.F.R. 2.719 clearly do not apply." * * *

Northern Indiana (Bailly), 7 NRC 429, 431 (emphasis supplied).

By identifying, in this first pertinently interpretive case, these two separate categories of responsibility for the subordinate NRC Staff Administrators, the Commission also defined two separate areas of its function--one a formal proceeding within Sec. 189 of the AEA, the other agency action not within Sec. 189. Thus function determines the legal basis for jurisdiction. It becomes clear that the Commission never intended, from the outset, that its prosecutorial, or investigative functions such as a Director's Denial be considered equivalent to those "on the record adjudications" or "proceedings" which come under either the APA at 5 U.S.C. § 554 or the AEA at § 189(a).

The Commission's view that the 2.206 process is not a proceeding within Sec. 189(a) has been reiterated over and over: "it is not a 'proceeding'.". . .

NRC Brief, pp. 23, fn.8, 24-25, also p. 25, fn.11.

The Court of Appeals has merely drawn attention to what should have been obvious before. Since they are not "proceedings" under the Act, Directors' Denials are not directly reviewable in the Court of Appeals.

Ms. Lorion had raised at least one substantial issue of material fact in her letter to the agency: The unacceptable safety risk presented by continued operation of the reactor in light of the NRC's own disclosures about reactor pressure vessel embrittlement and resultant susceptibility to pressurized thermal shock. The nature of the informal agency process at 2.206 did not permit a further opportunity for Ms. Lorion to reframe her request or submit such facts and other information as she might have submitted in

a formal proceeding. Nor did the Director provide Ms. Lorion with notice of the implementation of the Director's Decision process as was suggested under the agency procedures at (Supplemental Information) 42 F.R. 36239. Ms. Lorion raised at least one "serious health and safety issue" and had she been given the opportunity she might have produced evidence supporting her position. Clearly, she could have embellished the record by developing the NRC staff's own view that the reactor pressure vessel impairment was "approaching levels of concern,"[21] such that

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21. The reactor pressure vessel impairment is described by the Commission as "approaching levels of concern" due to its age coupled with the high levels of degradation being experienced. Letter Darrell Q. Eisenhut, Director, Division of Licensing, Office of Nuclear Reactor Regulation to Florida Power and Light Company, Robert E. Uhrig, V.P., August 21, 1981. Commission's Show Cause letter under 10 C.F.R. So. 54(f) R. Doc. No. 20, p. 1, J. App./ Index to J. App. Sup. Ct.

continued full power operation might pose a significant health and safety hazard.

The major flaw in the Director's development of the record lies in the fact it is a generic treatment, not a site specific one. Here Turkey Point fell on a worst-case category.

Although the Supreme Court held in Citizens to Preserve Overton Park, 401 U.S. 402 (1971) that fact finding beyond the administrative record is usually inappropriate, a reviewing court in considering whether the agency's decision was arbitrarily capricious or otherwise inconsistent with the law may examine the administrative record (1) as to its completeness, (2) whether the agency explained its decision correctly, (3) whether the administrative process was tainted, and (4) whether the agency's accounting in court of interpretation of

relevant regulations is consistent with its previous interpretations. Whatever its motive, the record compiled by the Commission here does not appear to be complete. In order to obtain imprimatur of the reviewing court, the agency must have included all relevant documents considered by it, not only those it relied upon. Pierson v. United States, 428 F. Supp. 381, 392 (D. Del. 1977). For example, the response the Commission had requested from FPL on the Pressurized Thermal Shock and Reactor Pressure Vessel Problem, due 60 days from August 21, 1982, (ref. R. Doc. No. 20, p. 147) were not included in the record or otherwise accounted for. Apparently, the Commission had granted some extension to FPL for response. This cannot be determined without reviewing documents extrinsic to the record. (See NRC Staff Evaluation of

Pressurized Thermal Shock Nov. 1982, p. A-16, Table A-1, entitled, "Summary of responses to NRC letters dated August 21, 1981 concerning thermal shock issue" dated, October 7, 1981. This document and its information does not occur in the record, yet it had existed in draft form in October 1981 and was published November 13, 1981 in final form. The information that the Turkey Point Unit 4 pressure vessel had exceeded four (4) effective full power years (EFPY) is not reflected in the record, (yet it had achieved 5.67 EFPY. See NRC Staff Evaluation of PTS, supra, Table P. 1); nor is any quantification of the quantity and deposition of copper in its pressure vessel reported. (See NRC Staff Evaluation of PTS, supra, Table P. 1. Reports 0.32% copper for Turkey Point Unit 4 according to the "best information available.") The only site

specific record reference is that Unit 4 falls into a category "approaching levels of concern" (NRC letter to FPL, August 21, 1981. Show cause letter under 10 C.F.R. 50.54(f) (R. Doc. No. 20, p.1).

Given the opportunity, Ms. Lorion could have developed site specific evidence through the testimony of NRC and FPL witnesses. They could have testified to the effect that, by the end of 1981, the Turkey Point Unit No. 4 had operated a total of 5.67 effective full power years. That length of operation placed it in that category of reactors which Mr. Basdekas, the NRC reactor safety engineer, had recommended be shut down after 4 EFPY due to their susceptibility to a core melt type accident.[22] On April 10, 1981, Mr.

22. A Nuclear Regulatory Commission Staff Report indicated that as of that time Unit 4 at Turkey Point had operated for 5.43 EFPY. See NRC Staff Evaluation of Pressurized Thermal Shock, Table P. 1,

[Footnote continued on next page.]

Basdekas had stated in a letter to the Honorable Morris K. Udall, Chairman, Subcommittee on Energy and the Environment:

> . . . it is apparent to me that those PWR's with high copper alloy welds that have operated 4 FPYE must be shut down . . . . Demetrios L. Basdekas NRC Safety Engineer letter to Honorable Morris K. Udall, Chairman, Subcommittee on Energy and the Environment April 10, 1981.

R. Doc. No. 15 J. Appendix, Index J. App. Sup. Ct.

Finally, and most significantly, had she been given an opportunity to participate, Ms. Lorion could have shown that the

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22. (Continued)

November 13, 1981. Also see The Miami Herald, September 8, 1981, "U.S. Reports Possible Flaws in N-Plants", also USNRC Issuance: NRC Staff Seeks Additional Information on Pressure Vessel Thermal Shock, Wed., Aug. 26, 1981, USNRC Office of Public Affairs, Atlanta, Ga. (FPYE (full power years effective) means simply the number of years a plant has operated at full power levels. The NRC Staff Evaluation of Pressurized Thermal Shock, 11-13-82, also tells us that the Turkey Point Unit 4 is one of those PWR's with high copper alloy welds (See Table P.1).

Commission's own probabalistic analyses of the likelihood of a pressurized thermal shock event coupled with reactor pressure vessel embrittlement had a much greater probability of occurance than the Commission's own 10 C.F.R. Part 50, and 100 criteria would allow.[23] By these and

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23. "Core Melt - The core melt safety goal guideline states, 'The likelihood of a nuclear reactor accident that results in a large-scale core melt should normally be less than one in 10,000 per year of reactor operation' (referencing 10 C.F.R. 100 setting guidelines on fission produced releases and 10 C.F.R. 50 guidelines). This suggests that the core melt frequency ascribable to one sequence, for example PTS, compared to other sequences should not exceed approximately 10-5 per reactor year.

"Because of the unusually large uncertainty in the risk estimation for PTS compared to other sequences, a value of less than 10-5 might well be assigned for a safety goal for PTS. We have not done this. The reader should keep in mind that the risk numbers of PTS given in the following discussion are highly uncertain.

"We have no technical analysis of the course and consequence of a PTS sequence that involves RPV (reactor pressure vessel) failure. . . ."

NRC Staff Evaluation of Pressurized Thermal Shock, Enclosure A, p.8-9, PTS Report Section 8, November 13, 1982. (The Enclosure is the main body of the report.)

other facts, most of which can be found in the ex parte record assembled by the Commission itself, it is clear that a genuine issue of material fact concerning a significant health and safety issue was presented.

Ms. Lorion could have contributed to developing a complete record had she been permitted to participate.

The agency's conduct of the record is flawed by its incompleteness and inadequacy. The flaw is directly ascribable to the Commission's failure to develop in the record relevant site specific data then available pertaining to the worst-case condition of the Turkey Point Plant. The flaw lies in the generic consideration of the RPV and PTS problem performed by the agency, while ignoring available site specific data. It is apparent that all relevant documents "directly or indi-

rectly" before the agency, considered or relied upon by agency subordinates, were not included and this serious omission thereby renders the agency record inadequate to the point of being defective. See Tenneco Oil Co. v. Department of Energy, 475 F. Supp. 299, 318, 319 (D. Del. 1979). Respondents here submit that they have demonstrated some reasonable basis for believing that the administrative record is incomplete.

The ruling of the court of appeals charts a new jurisdictional course for these informal agency actions. Only a few Director's Decisions have been reviewed by the various Courts of Appeals. By virtue of its location, the District of Columbia Circuit historically has played a central role in review of federal agency litigation. The 7th Circuit follows the District of Columbia Circuit in reviews of

Director's Decisions. Judge Luther M. Swygert of the 7th Circuit, sitting by special designation on the Lorion panel participated in the Court's decision here. Also, Judge Posner, Circuit Judge of the 7th Circuit wrote the decision in Rockford, supra, which was partially relied upon by the Court in Lorion in reaching its decision.

When the Supreme Court in the Overton Park case said the bare record may not disclose the factors that were considered by the official, 401 U.S. at 420, it implied that if the administrative record does not disclose the agency's considerations or interpretations of the evidence, the court may require "additonal explanation of the reasons for the agency decision as may prove necessary." Camp v. Pitts, 411 U.S. at 142-143.

This Court found that a de novo proceeding is appropriate only when the

fact finding process below is inherently defective. That is the case here. The major flaw in the record is its generic treatment of a site specific problem. The worst-case category of Unit 4 dictated site specific considerations be included in any fair analysis of the significance of health and safety considerations.

CONCLUSION

The judgment of the Court of Appeals should be affirmed. The case should be returned to that court so that its judgment may be given effect.

Respectfully submitted,

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Nos. 83-703 and 83-1031

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

FLORIDA POWER & LIGHT COMPANY,
Petitioner,
v.
JOETTE LORION, *et al.*,
Respondents.

UNITED STATES NUCLEAR REGULATORY COMMISSION
and THE UNITED STATES OF AMERICA,
Petitioners,
v.
JOETTE LORION, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF FOR PETITIONER FLORIDA POWER & LIGHT COMPANY

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REPLY BRIEF FOR PETITIONER FLORIDA POWER & LIGHT COMPANY

INTRODUCTION

The opinion below, reproduced in the appendix to the petition in No. 83-703,[1] concludes that, although section 189 of the Atomic Energy Act (42 U.S.C. § 2239) and the Administrative Orders Review Act (28 U.S.C. § 2342),

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[1] Cited hereinafter as "Pet. App. ——".

popularly known as the "Hobbs Act," confer exclusive jurisdiction on the courts of appeals to review final Nuclear Regulatory Commission orders in "any proceeding" for the "granting, suspending, revoking, or amending of any license . . .," those statutes do not confer jurisdiction upon the courts of appeals to review orders of the Commission declining a request to suspend a license. The opinion did not suggest that its conclusion was desirable, recognizing that that conclusion does not comport with "the well-founded presumption against bifurcation of judicial forums . . ." or with "notions of judicial economy . . ."[2] Nor did the court below conclude that the legislative history compelled the result.[3] Nor did it express doubts concerning the ability of the courts of appeals to conduct such reviews adequately.[4] Rather, the decision below is apparently based solely upon a reading of section 189 as establishing an "unusual, interlocking scheme" which limits court of appeals jurisdiction to "formal proceedings" conducted by the NRC (Pet. App. 2, 6, 13-14), *i.e.*, those "in which a person may, upon request, demand a hearing" (Pet. App. 5).

In sum then, the decision under review was rendered not because the court below thought the result desirable or one that was intended by Congress. Rather, it is based entirely on the view that the language of section

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[2] Pet. App. 12.

[3] With respect to the legislative history, the court merely concluded that: "There is no evidence in the sparse legislative history surrounding the passage of 42 U.S.C. § 2239 to suggest that Congress envisioned its jurisdictional grant in section 2239(b) to extend beyond orders entered in formal hearings." Pet. App. 13.

[4] The court did consider (Pet. App. 9-10) the reference to that question in Rockford League of Women Voters v. Nuclear Regulatory Commission, 679 F.2d 1218, 1220-21 (7th Cir. 1982). However, the court in Rockford appeared to conclude that considerations of "judicial economy" outweigh court of appeals' "lack of factfinding capacity [which] can be got round in other ways." *Id.* at 1221. Nothing in the opinion below suggests disagreement with this view.

189—as interpreted by that court—compels the result that was reached. And in her brief[5] defending that result, Respondent Lorion also places heavy emphasis upon "the clear intent of the language and structure of section 189 . . ." and related provisions of the Atomic Energy Act.[6]

We believe that the petitioners' main briefs adequately demonstrate why the conclusion below is not in fact compelled by either the language or the history of section 189 and why this Court should reverse. Therefore, this reply brief only addresses three arguments made in Respondent Lorion's brief in support of the decision—arguments which were not in fact depended upon in the opinion.[7]

The first of these is an attempt to establish that the court below "understated the support for its conclusion provided in the legislative history . . ." (Resp. Br. 33) and that Congress indeed intended to confine the scope of section 189 to agency proceedings of the type the court had in mind. The second argument is that the Administrative Procedure Act (5 U.S.C. § 551, *et seq.*), the Atomic Energy Act, or both, require formal adjudicative procedures at every stage of a section 189 pro-

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[5] Hereinafter cited as "Resp. Br. ——."

[6] Resp. Br. 48-51.

[7] This brief does not, of course, attempt to respond in this forum to the allegations contained in Respondent Lorion's brief which suggest that FPL's Turkey Point Unit No. 4 nuclear reactor is operating unsafely because of problems relating to "embrittlement" or "pressurized thermal shock." *See, e.g.*, Resp. Br. 2-3, 96-97. Suffice it to say we strongly disagree with those allegations. For those who may be interested, the general problem and the NRC's plans for dealing with it are described in a proposed regulation which the Commission has published. 49 Fed. Reg. 4498, *et seq.*, (February 7, 1984). Facts bearing on the matter as it specifically relates to Turkey Point Unit No. 4, including details concerning FPL's plans with respect to the matter and the NRC's satisfaction with them, are contained in publicly available correspondence in NRC Docket No. 50-251.

ceeding. The third argument is that if there is court of appeals jurisdiction, the requirements of the Hobbs Act are such that, in any event, a significant proportion of cases will have to be referred to district courts; the administrative decisions will therefore merely "be screened by the courts of appeal before they get to the district courts" (Resp. Br. 5-8), resulting in "trifurcation of review" rather than merely "bifurcation" (Resp. Br. 39). A related argument is that if the record is inadequate for judicial review in a case such as the instant one, a court of appeals would be prevented by the Hobbs Act from remanding for further proceedings, and apparently would therefore have to act on the inadequate record.[8] Again, the inference appears to be that judicial efficiency would be disserved by court of appeals review.

We submit that each of these new arguments is erroneous and fails to support the opinion below.

ARGUMENT

I. THE LEGISLATIVE HISTORY DOES NOT SUPPORT LIMITATION OF SECTION 189 TO "FORMAL PROCEEDINGS"

The main brief for the Federal Petitioners[9] argues (pp. 23-33) that the legislative history supports court of appeals review. In its main brief[10] FPL agreed with the court below that the legislative history is "sparse" but took the position that "[t]he statutory history that does exist favors the view rejected by the Court of Appeals." (pp. 17-18, n.13). Respondent Lorion's brief contends that under subsection (b) of section 189 court of appeals jurisdiction to review final NRC orders was deliberately limited by Congress to proceedings of the type specified

[8] Resp. Br. 67-68.

[9] Hereinafter cited as "Fed. Br. ——".

[10] Hereinafter cited as "FPL Br. ——".

in subsection (a) and that a hearing requirement was imposed with respect to those proceedings,[11] *i.e.*, a hearing was "to be required by law."[12] We do not take issue with this view of the legislative history; however, it does not advance respondent's position. The history sheds no light upon the question when a proceeding of the type enumerated in subsection (a), including a proceeding "for the . . . suspending" of a license, may be regarded as having begun. Consequently, nothing in respondent's recital casts doubt upon the validity of the line of cases holding that a Director's refusal to initiate enforcement action is "a necessary first step" in such a proceeding.[13]

The respondent's discussion of the legislative history demonstrates nothing more than the Congressional intent to specify in subsection (a) of section 189 the categories of agency actions reviewable in the courts of appeals pursuant to subsection (b), but the record goes no farther than this. In particular, it is completely silent as to the level of formality contemplated for the required hearing; as to the stage in a proceeding at which a hearing requirement attaches; and as to the appropriateness of the Commission's adopting an informal process, such as 10 CFR § 2.206, to terminate proceedings not requiring hearings. If anything, the legislative history establishes that Congress was simply not considering such procedural issues when it adopted the interlocking scheme contained in section 189.

[11] Resp. Br. 32-33, 46-47, 60-62. In connection with this argument, emphasis is given to the transfer of the hearing requirement from section 181 of the bill to section 189 and the colloquy between Senators Hickenlooper and Pastore where it was stated that the purpose of the transfer was to "clearly specify the types of Commission activities in which a hearing is to be required." Resp. Br. 35-36, 59-60.

[12] Resp. Br. 61-62.

[13] *See* FPL Br. 12-14; Fed. Br. 16-17.

Congressional silence on these critical questions is consistent with FPL's view that the intent was simply to provide that Commission orders entered in any of the categories of proceedings specified in section 189(a) are reviewable pursuant to section 189(b); and neither the language of the statute nor its legislative history suggests that a proceeding may not be properly terminated by informal means in advance of a hearing. Those conclusions are most consistent with the underlying objective of the Atomic Energy Act: the establishment of a comprehensive, coherent and efficient regime for regulating non-governmental use of nuclear energy.[14]

II. NEITHER THE ADMINISTRATIVE PROCEDURE ACT NOR THE ATOMIC ENERGY ACT REQUIRES FORMAL ADJUDICATIVE PROCEDURES IN SECTION 189 PROCEEDINGS

Based upon the relationship of the Administrative Procedure Act (5 U.S.C. § 511, *et seq.*) to the Atomic Energy Act, Respondent Lorion appears to argue that the *sine qua non* of any section 189(a) proceeding is the availability of formal adjudicative procedures. As respondent observes,[15] section 181 of the Atomic Energy Act makes the provisions of the APA applicable to NRC action taken under Chapter 16 of the Atomic Energy Act.[16] Respondent suggests that the term "proceeding" cannot, therefore, encompass an agency process that does not meet the APA definition in 5 U.S.C. § 551(12).[17] According to respondent, "the principal function of the APA was to prescribe the procedural requirements that agencies must observe in rulemaking, licensing, and adjudicative proceedings while preserving their flexibility to develop other forms of agency process to address other problems as they emerged."[18] The argument appears to be that the APA imposes upon the NRC the obligation to afford certain minimum procedural rights to participants in agency proceedings and that, if these rights are not granted, the agency action cannot be considered a proceeding at all; therefore, it cannot be a proceeding within the meaning of section 189.

This argument is refuted by the APA itself. 5 U.S.C. § 551(12) defines the term "agency proceeding" to include rulemaking, licensing and adjudication. "[A]djudication" is the "agency process for formulation of an order," 5 U.S.C. § 551(7). An "order" is defined as "the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing." 5 U.S.C. § 551(6). As Davis has explained, "[t]he heart of the definition of 'adjudication' thus is: A final disposition of 'a matter' other than rulemaking." Davis, *Revising the Administrative Procedure Act*, 29 Ad. L. Rev. 35, 38 (1977). In *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132 (1975), this Court, considering the effect of a dismissal of an unfair labor practice complaint by the Regional Director of the NLRB, invoked and followed the APA definition, and concluded that "[t]he decision to dismiss a charge is a decision in a 'case' and constitutes an 'adjudication'. . . ." 421 U.S. at 158.[19] By the same reasoning, denial of a 10 CFR § 2.206 enforcement request constitutes an informal ad-

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[14] *See* FPL Br. 18-19.

[15] Resp. Br. 48.

[16] "Judicial Review and Administrative Procedure," 42 U.S.C. §§ 2231-2241.

[17] Resp. Br. 46.

[18] Resp. Br. 49, n.12.

[19] Earlier, in IT&T v. Local 134, 419 U.S. 428, 443-44 (1975), this Court held, with respect to an agency action that did not have the same determinative consequences for a party as did the dismissal in Sears, Roebuck or the Director's decision in the instant case, that the action did not constitute an adjudication within the meaning of the APA.

judication in a proceeding relating to licensing, and is reviewable in the court of appeals.

However, the fact that it is such an adjudication does not trigger application of the APA formal adjudicatory procedures. These are required by that act only in cases "of adjudication required by statute to be determined on the record after opportunity for an agency hearing," 5 U.S.C. § 554(a); *United States* v. *Florida East Coast Railway Co.*, 410 U.S. 224, 241 (1973); *United States* v. *Allegheny-Ludlum Steel Corp.*, 406 U.S. 742, 758 (1972). That requirement is contained nowhere in the Atomic Energy Act. 5 U.S.C. § 554(a) is therefore simply inapplicable.

Conceivably, it could be argued that, independent of the APA, section 189(a) or some other provision of the Atomic Energy Act requires formal (*i.e.*, "on the record") adjudication in all proceedings referred to in that section—and at all stages of those proceedings. But no court has held that such a requirement exists. To be sure, the question of what type of hearings are required under section 189 has not been definitively settled. On the one hand, in *Union of Concerned Scientists* v. *NRC*, 735 F.2d 1437, 1444-45 n.12 (D.C. Cir. 1984), the court suggested that even though the "on the record" language is missing from section 189(a), a number of considerations point to the requirement of such "on the record" procedures for proceedings under the section. However, the court expressly refrained from deciding the matter because, in the circumstances, the NRC regulations comport with or surpass the APA requirements.

On the other hand, the bulk of the authority is to the contrary. Thus, the D.C. Circuit has upheld a proceeding for the issuance or modification of rules and regulations dealing with the activities of licensees which only encompassed informal notice and comment. *Connecticut Light & Power Co.* v. *NRC*, 673 F.2d 525 (D.C. Cir. 1982). Of course, in *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 543-48 (1978), this Court made it perfectly clear that the Commission has discretion to issue such rules and regulations upon the basis of the minimum APA notice and comment requirements. *See also Baltimore Gas & Electric Co.* v. *NRDC*, —— U.S. ——, ——, 103 S.Ct. 2246, 2250 (1983). And, even with respect to proceedings for the issuance of certain licenses, including a license to process special nuclear material, by-product material or source material, such informal procedures have been utilized. *City of West Chicago* v. *NRC*, 701 F.2d 632, 641-45 (7th Cir. 1983). In *City of West Chicago*, the court held, with respect to the question whether the governing statute satisfies the "on-the-record" requirement of 5 U.S.C. § 554, that

> in the absence of these magic words, Congress must clearly indicate its intent to trigger the formal, on-the-record hearing provisions of the APA. [Citations omitted]. We find no clear intention in the legislative history of the AEA, and therefore conclude that formal hearings are not statutorily required for amendments to materials licenses.

Id. at 641.

However, even if it is ultimately decided that a full adjudicatory hearing is required for some or all section 189 licensing proceedings, it would not follow that either the APA or the Atomic Energy Act proscribe the use of preliminary screening techniques in the first stage of such a proceeding in order to determine whether the threshold requirements for a hearing—whatever its required degree of formality if conducted—is met. Usage of such screening techniques is widespread and favored by considerations of administrative efficiency.[20] The 10 CFR § 2.206 process serves precisely the same function.

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[20] *See* FPL Br. 14-15; Fed. Br. 18-20.

Respondent Lorion attempts to distinguish the standing and summary disposition line of cases, in which proceedings are terminated without evidentiary hearings, from the screening procedures followed under 10 CFR § 2.206, upon the presence or absence of procedural safeguards, including notice, right of confrontation, and *ex parte* rules to protect the record.[21] This argument suffers from the same logical flaw that undermines respondents' basic case. That is, it assumes that the hearing referred to in section 189(a) necessitates formal trial type procedures at every stage, including the pre-hearing process, and that the employment of informal methods of screening is inconsistent with the requirements of the section, such that the section 2.206 process cannot be a step in a proceeding reviewable in the courts of appeals. Again, respondent ignores the fact that nothing in the Act or in its legislative history precludes the Commission from developing informal procedures to resolve initial questions concerning the necessity for a hearing. Respondent simply—and erroneously—equates "proceeding" with formal evidentiary adjudication.

The more natural reading of the statute, and the interpretation more consistent with the legislative history and the objectives of the Act, is that the proceedings specified in section 189(a) were intended, under section 189(b), to result in orders reviewable in the courts of appeals, as well as to specify the proceedings in which hearings are required. Whether such a proceeding is terminated prior to a hearing because of lack of standing or contentions, by way of summary disposition, or because of a Directors Denial pursuant to 10 CFR § 2.206, the issue on appeal is the agency's application of its discretion. As long as the record is adequate for court of appeals review, nothing in the statute prescribes any particular way in which a proceeding may terminate short of a formal hearing.

[21] Resp. Br. 75-77.

III. THE HOBBS ACT PRESENTS NO SIGNIFICANT BARRIERS TO COURT OF APPEALS REVIEW OF 10 CFR § 2.206 PROCEEDINGS

Respondent Lorion's most novel argument appears to be that, as a practical matter, even if the courts of appeals are held to have jurisdiction to review Directors Denials, because of the operation of the Hobbs Act, a "significant proportion of" the cases will, in any event, have to be transferred to the district courts. Consequently, respondent argues, the "practical issue" presented in this case is not whether those denials should be reviewed in the district courts or courts of appeals, but whether they "should be screened by the courts of appeal before they get to the district courts."[22] This, respondent contends, would result not merely in "bifurcation of review" but in something worse, "trifurcation."[23] The implications are that Congress could not have intended this bizarre consequence when it enacted section 189 and that considerations of efficiency and judicial economy also favor affirmation of the decision below.

The difficulty with the argument is that the postulated consequence is not in fact required. Respondent simply misreads the relevant section of the Hobbs Act, 28 U.S.C. § 2347(b), and misunderstands the process involved in Directors Denials.

Among other things, 28 U.S.C. § 2347(b) provides for court of appeals review of agency proceedings in circumstances in which "the agency has not held a hearing before taking the action of which review is sought." It requires the court of appeals first to determine whether a hearing is required by law. When it makes that determination, paragraph numbered (1) of the provision requires the court to remand the proceeding to the agency to hold a hearing. If the court determines that

[22] Resp. Br. 5-8.

[23] Resp. Br. 39.

a hearing is not required by law, it has two alternatives. If it appears "that no genuine issue of material fact is presented," paragraph numbered (2) requires the court of appeals to "pass on the issues presented." If, however, a "genuine issue of material fact is presented," the court of appeals is required to "transfer the proceedings to a district court . . . for a hearing and determination as if the proceedings were originally initiated in the district court. . . ."

The transfer provision has been rarely used,[24] and obviously it applies only when "a genuine issue of material fact is presented." Consequently, petitioners argue that persons aggrieved by Directors Denials "will frequently be able to demonstrate that there are genuine issues of material fact and thus that transfer to the appropriate district court is required under the Hobbs Act." [25]

However, this statement is based upon a misperception. Actually, what is involved in most Directors Denials, including the instant one, is not a dispute about a "genuine issue of material fact." Respondent Lorion's essential quarrel is not with the accuracy of the facts considered by the Director, but rather with the wisdom of his decision not to institute show cause proceedings. That is an issue of abuse of discretion properly resolvable on the record by the courts of appeals. More generally, the resolution of questions concerning the validity of an agency's exercise of discretion usually cannot practically be furthered by district court fact finding. Where, as here, informal, discretionary agency actions may be set aside only if "arbitrary and capricious," 5 U.S.C. § 706(2)(A), the existence of an issue of material fact is irrelevant to the reviewing court's required determination "whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 416 (1971). Consequently, transfer to a district court would not be required in most cases.

[24] FPL Br. 30, n.25.

[25] Resp. Br. 7; *see also* 37, 67-68, 78-79.

Respondent Lorion makes a further Hobbs Act argument. It is apparently made in response to FPL's suggestion that, while the record compiled by a Director in a 10 CFR § 2.206 proceeding ordinarily provides an adequate basis for court of appeals review, if the record in a particular case should turn out to be inadequate [26] the court may remand the matter to the agency to supplement the record.[27] Respondent Lorion appears to argue that, because of the Hobbs Act, remand for that purpose is not possible and the court will therefore have to act on the basis of an inadequate record. Again, respondent's objective seems to be to illustrate the impractical consequences of court of appeals review.

Her argument appears to be based upon the following chain of reasoning. The courts have held that hearings are not required in 10 CFR § 2.206 proceedings.[28] Where a hearing is not required by law, a "court of appeals has only two choices." If there is presented a genuine issue of material fact, the court of appeals must transfer the proceeding to the appropriate district court pursuant to 28 U.S.C. § 2347(b)(3). However, if no such issue is presented, "then and only then, the court of appeals must pass upon the issue of law presented. 28 U.S.C. § 2347(b)(2)." [29]

[26] It should be noted that, to date, no court has ever found the record compiled in a 10 CFR § 2.206 proceeding inadequate for meaningful judicial review.

[27] FPL Br. 27-31; *see also* Fed. Br. 39, n.32.

[28] Resp. Br. 73-74.

[29] Resp. Br. 67-68 (footnote omitted); *see also* 36-37, 80-81.

However, the Hobbs Act plainly provides for court of appeals review of informal proceedings, for it contemplates review of administrative proceedings "when a hearing is not required by law." And the legislative history makes it clear that provision for such review was deliberately included in the law.[30] It would be anomalous to assume that the Congress conferred exclusive jurisdiction on the courts of appeals to review informal agency action for abuse of discretion, and that, at the same time, it precluded those courts from following what the D.C. Circuit Court of Appeals has described as the "normal course" when a determination is made that an informal agency record is inadequate for such review. Thus in *ITT World Communications, Inc.* v. *FCC*, 699 F.2d 1219 (D.C. Cir. 1983), the court of appeals concluded that the existing agency record was insufficient to permit review, for abuse of discretion, of an FCC order declining to institute rulemaking proceedings. Citing *Camp* v. *Pitts*, 411 U.S. 138 (1973), *United States Lines, Inc.* v. *FMC*, 584 F.2d 519 (D.C. Cir. 1978), and *Greater Boston Television Corp.* v. *FCC*, 444 F.2d 841 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971), the court observed that in such a case the "normal course would simply be to instruct the Commission to consider the issues further and develop an adequate record for judicial review." *Id.* at 1248.[31] *See also Environmental Defense Fund, Inc.* v. *Hardin*, 428 F.2d 1093, 1096 (D.C. Cir. 1970), where the court of appeals remanded to the agency in order to obtain "the record necessary for meaningful appellate review" of the issuance of notices of cancellation with respect to certain uses of DDT.

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[30] Hobbs Act: Hearings on H.R. 2915 Before Subcommittee No. 2 of the House Judiciary Committee, 81st Cong., 1st Sess. 28 (1949).

[31] This would not, as respondent assumes (Resp. Br. 48-49, n.12), require an agency hearing when no hearing is required by law.

The Hobbs Act does not in fact deal with the question of how best to supplement an agency record that is deficient for reasons other than inadequate fact finding. The ordinarily appropriate cure for a record insufficient to provide a basis for deciding questions concerning the exercise of agency discretion is remand to that agency for further explanation. In the absence of a clear Congressional prohibition of this "normal course," no such illogical restraint should be assumed; and, as demonstrated above, the courts have in fact made no such assumption. Indeed, as recently as last term, this court affirmed a court of appeals decision to remand a case to the FCC for supplementation of the record, without even discussing possible Hobbs Act restraints on such remand. *FCC* v. *ITT World Communications, Inc.*, —— U.S. ——, 104 S.Ct. 1936 (1984).

Respondents' Hobbs Act arguments are therefore wholly inconsistent with that Act, the realities, or judicial practice or understanding.

CONCLUSION

The respondents' arguments in support of the decision below—none of which were relied upon in the opinion under review—do not provide a basis for affirmance of the decision.

Respectfully submitted,

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October 5, 1984

Nos. 83-703 and 83-1031

In the Supreme Court of the United States

OCTOBER TERM, 1983

FLORIDA POWER & LIGHT COMPANY, PETITIONER

v.

JOETTE LORION, ET AL.

UNITED STATES NUCLEAR REGULATORY COMMISSION AND UNITED STATES OF AMERICA, PETITIONERS

v.

JOETTE LORION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR FEDERAL PETITIONERS

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REPLY BRIEF FOR FEDERAL PETITIONERS

Respondents' legal argument is principally based on one proposition: that Congress used the word "proceeding" in Section 189(a) of the Atomic Energy Act of 1954 (42 U.S.C. 2239(a)) to refer only to those formal agency undertakings in which hearings must be held as a matter of course. Respondents also advance a practical argument, asserting that the courts of appeals would in any event need the assistance of the district courts to review agency decisions that had not been preceded by hearings. We shall answer these points in order.

1. Respondents assert that the "proceedings" described in Section 189(a) are those in which the NRC must hold hearings. They rely primarily on the Administrative Procedure Act (APA) (5 U.S.C. 551 *et seq.*), suggesting that the APA defines "proceeding" to include only formal agency undertakings accompanied by a hearing (Resp. Br. 46, 48-50). Because Section 189(b) provides for review in the courts of appeals of "[a]ny final order entered in any proceeding of the kind specified in [Section 189](a)," respondents conclude that "the kind" of agency actions susceptible to court of appeals review are those in which hearings must be held (see Resp. Br. 15). Respondents add that the legislative history of Section 189 and the NRC's own interpretation of the statute supports their reading.

a. Respondents' analysis of the APA plainly is incorrect. That statute defines "agency proceeding" to include "licensing" and "adjudication" (5 U.S.C. 551(12), (9) and (7)). These latter terms are defined broadly to include a range of informal agency action. Thus licensing "includes agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation, amendment, modification, or conditioning of a license" (5 U.S.C. 551(9)). Adjudication "means agency process for the formulation of an order" (5 U.S.C. 551(7)), and order is in turn defined to "mean[] the whole or a part of a final disposition * * * of an agency in a matter other than rule making" (5 U.S.C. 551(6)). This includes, of course, dispositions reached without the benefit of a hearing. See, *e.g.*, *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 158 (1975); *Camp* v. *Pitts*, 411 U.S. 138, 141 n.3 (1973); *Izaak Walton League* v. *Marsh*, 655 F.2d 346, 361-362 & n.37 (D.C. Cir.), cert. denied, 454 U.S. 1092 (1981).[1] In short, the word "proceeding" as it is used in the APA encompasses informal administrative actions that do not involve a hearing.

b. It is equally plain that respondents' reading of the word "proceeding" finds no support in Section 189(a) itself. Because the statute states that the NRC "shall" hold a hearing in any proceeding in which one is requested, respondents evidently mean to suggest that an administrative undertaking in which a hearing is not held cannot be a proceeding (see Resp. Br. 46). But as our opening brief demonstrated, a hearing is not the defining characteristic of a "proceeding": Section 189(a) explicitly makes provision for proceedings in which no hearings have been held (Br. 13), while decisions both of this Court and of the courts of appeals suggest that — despite the use of the word "shall" in the statute — in many instances a proceeding may be terminated before a hearing is held (Br. 13-14, 19-20). Again, then, Section 189(a) does not itself equate proceedings with formal, on the record administrative inquiries.

c. Despite respondents' suggestions to the contrary, the legislative history of Section 189 is consistent with this broad reading of the word "proceeding." Respondents correctly note that Congress in Section 189(b) provided for review under the Administrative Orders Review (Hobbs) Act (28 U.S.C. 2341 *et seq.*) only of "certain agency actions" (S. Rep. 1699, 83d Cong., 2d Sess. 29 (1954)) (see Resp. Br. 56), and that Section 189(a) was then written to provide for hearings only in the types of actions covered by Section 189(b) (see Resp. Br. 57-58; Br. 28). But this history provides

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[1]The APA mandates the use of formal hearing procedures in rulemaking or adjudication only when the statute involved requires a hearing on the record. See *United States* v. *Florida E. C. Ry.*, 410 U.S. 224, 241 (1973); 5 U.S.C. 554.

no support whatsoever for respondents' further conclusion that review in a court of appeals is available only after a hearing has taken place.

As we explained in our opening brief, the "certain agency actions" covered by Section 189(b) are those related to licensing: Congress took pains to allow for review under that provision of all agency orders involving the licensing process (Br. 24-27).[2] Congress then attached the right to a hearing before the agency to those same kinds of licensing cases (Br. 27-28). These developments certainly indicate that the right both to a hearing and to review in the court of appeals is tied to the subject matter of the action. But nothing in the legislative history suggests that the propriety of court of appeals review of an agency order is related, not to the substance, but instead to the degree of formality of the underlying agency proceedings.

d. Respondents nevertheless repeatedly insist that the NRC itself has endorsed their reading of Section 189(a). They assert that the agency's administrative pronouncements declare that preliminary proceedings under 10 C.F.R. 2.206 are not "proceedings" within the meaning of Section 189(a). They also maintain that the agency acknowledged as much in its brief below (Resp. Br. 4, 26, 27, 41, 42, 93-96).

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[2]At the time of its enactment, the Atomic Energy Act gave the Atomic Energy Commission authority over many areas other than licensing. See, *e.g.*, 42 U.S.C. 2201(e) (establish communities and grant privileges, leases and permits); *id.* Section 2201(o) (research and development activities); *id.* Section 2201(u) (enter contracts); *id.* Section 2204 (enter electric utility contracts); *id.* Section 2221 (require contractor to demonstrate lack of conflict of interest); *id.* (make just compensation for property taken); *id.* Section 2222 (condemn property); *id.* Section 2278a (prevent trespasses upon Commission installations); 42 U.S.C. (Supp. V) 2114(b) (require non-licensees to perform certain measures regarding byproduct material).

This argument, however, places far too much weight on loosely used language. The NRC's suggestions that prehearing denials of Section 2.206 requests are not "proceedings" plainly were not intended to serve as technical interpretations of that term as it is used in Section 189(a) or Section 189(b). To the contrary, on a fair reading these NRC statements seemingly mean only that the filing of a Section 2.206 request does not initiate a *formal* proceeding to which hearing rights attach as a matter of course. The Commission argued below, for example, that preliminary inquiries must be conducted under Section 2.206 to determine whether "*full* proceedings" (C.A. Br. 23 (emphasis added)) should be instituted. Indeed, in its administrative pronouncements the agency has on occasion characterized prehearing agency action leading to the denial of a Section 2.206 request as "proceedings."[3]

In any event, the Commission has bound itself to take action in response to Section 2.206 requests. The agency must "make an 'inquiry appropriate to the facts asserted,' " (*In re Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1)*, 7 N.R.C. 429, 432 (1978), aff'd, 606 F.2d 1363 (D.C. Cir. 1979), quoting *In re Consolidated Edison Co. (Indian Point Units 1, 2 & 3)*, 2 N.R.C. 173, 175 (1975)). It also must consider the relevant facts and articulate a proper rationale for its decision (*Northern Indiana*, 7 N.R.C. at 432), and must act on any request that raises a

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[3]For example, in *In re Consolidated Edison Co. (Indian Point Units 1, 2 & 3)*, 2 N.R.C. 175 (1975), the Commission staff engaged in "discussions" with Section 2.206 petitioners but, without holding a hearing, denied the petitioners' request that it issue a show cause order. The Commission nevertheless characterized an intra-agency appeal of the denial as a "proceeding" (2 N.R.C. at 174, 177), and referred to the possibility of "*further* proceedings" in addition to those already held (*id.* at 175, 176 (emphasis added)).

"substantial health or safety issue[]" (*Consolidated Edison*, 2 N.R.C. at 176). As we explained in our opening brief, under any normal reading of the word these preliminary agency actions are encompassed by the statutory term "proceedings" (Br. 21-23).[4]

e. In short, Section 189 uses the word "proceeding" — as it is defined in the APA[5] — to describe any agency process leading to the formulation of an order or the disposition of a "matter" (see 5 U.S.C. 551(6)). The term is used in precisely the same way in the Hobbs Act (Br. 15). And once it is accepted that this reading of the term is proper, respondents' legal argument necessarily collapses. Plainly, the elaborate although informal procedures used to dispose of respondent Lorion's Section 2.206 filing amounted to an agency "process" that led to the "disposition" of a "matter." Because Section 2.206 is concerned with licensing, respondent Lorion's filing initiated a proceeding "of the kind specified in [Section 189](a)." 42 U.S.C. 2239(b). As a result, review in the court of appeals is compelled by the statute.

2. Respondents nevertheless assert what they declare to be a compelling practical reason for having challenges to Section 2.206 denials resolved in the district courts. They

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[4]*In re Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1)*, 7 N.R.C. 429 (1978), aff'd, 606 F.2d 1364 (D.C. Cir. 1979), which is cited by respondents (Resp. Br. 93-94), is consistent with this reading of the Commission's view. The NRC there explained that 5 U.S.C. 554 and 10 C.F.R. 2.719 apply only to on the record adjudications, and therefore are inapplicable to preliminary denials of Section 2.206 requests. In reaching this conclusion the Commission plainly meant only that the filing of such requests does not necessitate the initiation of formal "enforcement proceedings" (7 N.R.C. at 431); the Commission acknowledged that it was obligated to respond formally to persons who file requests under Section 2.206.

[5]As is noted above, 42 U.S.C. (Supp. V) 2231 makes the APA applicable to the Atomic Energy Act's judicial review and administrative procedure provisions.

note that under the Hobbs Act, which governs judicial review of agency decisions reached in Section 189(a) proceedings, a reviewing court of appeals is to "pass on the issues presented, when * * * no genuine issue of material fact is presented" (28 U.S.C. 2347(b)(2)) — but that the court of appeals must transfer to a district court any appeal that presents such an "issue of material fact." 28 U.S.C. 2347(b)(3).[6] Respondents suggest that many Section 2.206 requests raise genuine issues of fact, so that appeals from denials of such requests inevitably will have to be referred to the district courts without having been passed upon by the courts of appeals (Resp. Br. 6-7, 67-68, 74).

a. Even if otherwise relevant,[7] this argument misreads the Hobbs Act and misstates the nature of judicial review of agency action. The issue on an appeal from the denial of a Section 2.206 request is not, as respondents suggest, whether the petitioner has a factual disagreement with the agency that the court is to resolve de novo (Resp. Br. 79). Instead, the court must determine only whether the agency's decision not to institute action against the licensee was "arbitrary, capricious, an abuse of discretion, or otherwise

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[6]The court of appeals is presented with this choice when a hearing before the agency "is not required by law" (28 U.S.C. 2347(b)(2) and (3)) and the agency has not in fact held a hearing. When a hearing that *is* required by law has not been held, the court must remand the proceeding to the agency so that a hearing may be convened (28 U.S.C. 2347(b)(1)).

[7]Our opening brief and the arguments above demonstrate that under "[t]he language of the statute * * * a decision of the sort at issue here is reviewable in the court of appeals, and nothing in the legislative history points to any different conclusion." *Harrison* v. *PPG Industries, Inc.*, 446 U.S. 578, 593 (1980). In these circumstances, respondents' contention that review in the courts of appeals would be impractical "is an argument to be addressed to Congress, not to this Court" (*ibid.*).

not in accordance with law" (5 U.S.C. 706(2)(A)).[8] In making this finding the court is to decide "whether the [agency] decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 416 (1971). Thus "the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." *Camp* v. *Pitts*, 411 U.S. 138, 142 (1973).

A review of this sort plainly will not present "issues of material fact," and reviewing appellate courts therefore will not be obligated to transfer such proceedings to the district courts. The reviewing court's role is to settle the legal question whether the agency properly exercised its judgment given the record before it; the court cannot itself resolve issues of fact by "substitut[ing] its judgment for that of the agency" (*Overton Park*, 401 U.S. at 416) or making "some new record" beyond that compiled by the agency (*Camp*, 411 U.S. at 142). This Court has explained that challenges brought under the Hobbs Act — even challenges involving consideration of the factual record developed by the agency — are to be resolved in the courts of appeals without recourse to the district courts, just as reviews of agency orders entered under other statutes typically are conducted. See *FCC* v. *ITT World Communications, Inc.*, No. 83-371 (Apr. 30, 1984), slip op. 4-5. Issues of fact requiring transfer of the case to the district court therefore will be presented

[8]There is no doubt that this standard governs the review of decisions taken under Section 189(a). Section 189(b) explicitly provides that the APA's judicial review standards are applicable in such challenges. In any event, this Court consistently has applied the standards of 5 U.S.C. 706 when reviewing agency action challenged under the Hobbs Act. See, *e.g.*, *Vermont Yankee Nuclear Power Corp.* v. *NRDC, Inc.*, 435 U.S. 519, 549 (1978); *FCC* v. *WNCN Listeners Guild*, 450 U.S. 582, 594 n.30 (1981); *FCC* v. *National Citizens Committee for Broadcasting*, 436 U.S. 775, 802-803 (1978).

only when the the agency's factfinding processes are inadequate,[9] or when the case requires the resolution of questions *in addition* to the legal one whether the agency acted arbitrarily or capriciously.[10]

b. Respondents' hints to the contrary notwithstanding, the record compiled by the Commission in its analysis of a Section 2.206 request generally will be more than adequate to allow for effective review in the courts of appeals under the abuse of discretion standard. Although several Section 2.206 denials have been challenged in the courts of appeals (see cases cited at Br. 7), no reviewing panel has found itself unable to determine the propriety of the Commission's decision because of the insufficiency of the record. This is hardly surprising: the record developed by the Commission prior to a ruling on a Section 2.206 request — submissions by the parties and material developed by the agency — is similar to the record considered during the review of any

[9]This reading of the Hobbs Act accords with the principles of judicial review set out in *Overton Park*, where the Court explained that a de novo review is justified under the APA only "when the action is adjudicatory in nature and the agency fact-finding procedures are inadequate," or "when issues that were not before the agency are raised in a proceeding to enforce nonadjudicatory agency action" (401 U.S. at 415). The Court's holdings suggest that these general rules guiding the review of agency decisions are fully applicable in cases reaching the courts of appeals under the Hobbs Act. See, *e.g.*, *ITT World Communications*, slip op. 4-5; *Vermont Yankee*, 435 U.S. at 549.

[10]An example of this principle is provided by what is apparently the only case to find a genuine issue of material fact under Section 2347(b)(3). In *Lake Carriers Ass'n* v. *United States*, 414 F.2d 567 (6th Cir. 1969), the petitioners sought to enjoin enforcement of an FCC order. An independent factual inquiry therefore had to be made to determine whether — apart from the question whether the agency had abused its discretion — the petitioners were threatened with irreparable harm.

informal adjudication or rulemaking.[11] See, e.g., *City of West Chicago* v. *NRC*, 701 F.2d 632, 644-645 (7th Cir. 1983); *Izaak Walton League* v. *Marsh*, 655 F.2d 346, 361-362 & n.37 (D.C. Cir.), cert. denied, 454 U.S. 1092 (1981); *Sea-Land Service, Inc.* v. *FMC*, 653 F.2d 544 (D.C. Cir. 1981); *Investment Company Institute* v. *Board of Governors*, 551 F.2d 1270, 1276, 1279-1281 (D.C. Cir. 1977). See generally *Harrison*, 446 U.S. at 593-594; *Camp*, 411 U.S. at 143. Further, directing challenges to the district courts rather than to the courts of appeals will not make review easier or more complete, because *all* courts are constrained by the APA's direction that review be grounded on "the administrative record already in existence" (*Camp*, 411 U.S. at 142). See *Harrison*, 446 U.S. at 594.

In any event, this Court has made it clear that, when there is "such failure to explain administrative action as to frustrate effective judicial review, the remedy [is] not to hold a *de novo* hearing but, as contemplated by *Overton Park*, to obtain from the agency * * * such additional explanation of the reasons for the *agency* decision as prove necessary" (*Camp*, 411 U.S. at 142-143). Similarly, when the agency's decision "is not sustainable on the administrative record

[11]Respondents are incorrect in suggesting that the Commission's order in this case either was tainted or was made unreviewable by the participation of agency staff in the investigation and formulation of the decision. See *Porter County Chapter of the Izaak Walton League* v. *NRC*, 606 F.2d 1363, 1370-1372 (D.C. Cir. 1979). Similarly, respondents' inability to respond directly to all record materials considered by the Commission did not make review of the record impossible. See *Action for Children's Television* v. *FCC*, 564 F.2d 458, 471 (D.C. Cir. 1977). Respondents also complain that the record is flawed because they were denied the opportunity to develop their factual and legal arguments. But they were free to submit whatever material they chose in support of their Section 2.206 request, and remain free at any time to submit another, more detailed petition under the Section.

made," the proceeding must be remanded to the agency for further consideration (*id.* at 143).[12]

c. Building on their earlier argument, respondents nevertheless seem to assert that the Hobbs Act bars such a remand to the agency when the record is inadequate for review in the court of appeals. They appear to maintain that when the appeals court is unable to review the agency's decision and a hearing before the agency is not required by law, 28 U.S.C. 2347(b)(3) requires the transfer of the proceedings to a district court (Resp. Br. 47, 66-67).

Again, respondents' novel reading of the Hobbs Act misreads Section 2347(b)(3) and distorts the import of that provision's reference to issues of material fact. Section 2347(b)(3) was enacted to provide for those circumstances when, because the agency was not required to hold a hearing, it was feared that the record would be inadequate for review and could not be supplemented by the agency.[13] See H.R. Rep. 2122, 81st Cong., 2d Sess. 4 (1950); *Providing for*

[12]Respondents argue at some length that the Commission abused its discretion in denying respondent Lorion's Section 2.206 request (Resp. Br. 98-106). This issue can and should be addressed by the court of appeals on remand. We also note that on February 7, 1984, the Commission promulgated a proposed rule addressing the safety concerns expressed by respondents. 49 Fed. Reg. 4498. Respondents could have commented on that proposed rule, and any challenges to the final rule will of course be reviewable exclusively in the court of appeals.

[13]At the time of the enactment of the Hobbs Act some doubt was expressed about the competence of courts of appeals to review agency action that had not been preceded by a hearing. See *Providing for the Review of Orders of Certain Agencies, and Incorporating into the Judicial Code Certain Statutes Relating to Three-Judge District Courts: Hearings on H.R. 1468, H.R. 1470 and H.R. 2271 Before Subcomm. No. 3 and Subcomm. No 4 of the House Comm. on the Judiciary*, 81st Cong., 1st Sess. 28, 81, 87, 91 (1949). Congress nevertheless provided for the review of such orders in the courts of appeals, with the transfer provision of Section 2347(b)(3) provided as a safeguard. See *id.* at 27-28.

the Review of Orders of Certain Agencies, and Incorporating into the Judicial Code Certain Statutes Relating to Three-Judge District Courts: Hearings on H.R. 1468, H.R. 1470 and H.R. 2271 Before Subcomm. No. 3 and Subcomm. No. 4 of the House Comm. on the Judiciary, 81st Cong., 1st Sess. 28 (1949). It is now plain, however, that courts of appeals generally are competent to review agency actions that were not preceded by a hearing, and that agencies may supplement inadequate records without holding hearings. See *Camp*, 411 U.S. at 143. Thus, in cases being reviewed under the Hobbs Act this Court repeatedly has stated that administrative proceedings should be remanded to the agency when "the administrative record is inadequate" for review (*ITT World Communications*, slip op. 5)); the Court never has suggested that Section 2347(b)(3) bars a remand of this sort. See, e.g., *ITT World Communications*, slip op. 5; *Vermont Yankee*, 435 U.S. at 549.[14]

Further, Section 2347(b)(3) can come into play only when material issues of fact must be resolved. As we explain above, however, factual judgments generally will not be material to a court's review of agency action under an abuse

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[14]Respondents plainly are incorrect in asserting (Resp. Br. 49 n.12, 80-81) that a remand to the agency for supplementation of the record would violate the dictates of *Vermont Yankee*. That case held that courts may not impose procedural requirements on agencies in excess of those set out in the APA (435 U.S. at 523-525, 543-544). But the Court recognized that reviewing courts may "remand an agency decision because of the inadequacy of the record," so long as the agency is left free on remand to " 'exercise its administrative discretion in deciding how • • • it may best proceed to develop the needed evidence and how its prior decision should be modified in light of such evidence as develops.' " *Id.* at 544, quoting *FPC* v. *Transcontinental Gas Pipe Line Corp.*, 423 U.S. 326, 333 (1976). Indeed, in *Vermont Yankee* itself the Court directed the court of appeals to determine on remand whether the agency's decision could be sustained on the administrative record; if not, the court of appeals was in turn to remand the case to the agency for further consideration (435 U.S. at 549).

of discretion standard. Courts of appeals therefore have a statutory mandate to "pass on the issues presented" (28 U.S.C. 2347(b)(2)) when reviewing agency action under that standard. For such review to be meaningful, of course, courts will have to remand the case to the agency when "there [is] such a failure to explain administrative action as to frustrate effective judicial review" (*Camp*, 411 U.S. at 142-143). And when the administrative decision under review " 'is not sustainable on the administrative record made, then the [agency] decision must be vacated and the matter remanded to [the agency] for further consideration' " (*Vermont Yankee*, 435 U.S. at 549, quoting *Camp*, 411 U.S. at 143; see *ITT World Communications*, slip op. 5). But cases leading to such remands do not present material factual issues that should be resolved by the courts.[15]

For the foregoing reasons and the reasons stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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Solicitor General

OCTOBER 1984

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[15]As is noted above, both *Vermont Yankee* and *ITT World Communications*, where remands of this sort were approved, involved agency action reviewed under the Hobbs Act.